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COMPENSATION FOR NATIONALISED PROPERTY IN POST-WAR EUROPE

I

FOLLOWING the cessation of hostilities after World War II, several European countries undertook the nationalisation of movable and immovable, tangible and intangible property belonging to their nationals and foreigners alike. These wholesale measures of expropriation have resulted in international conferences as to compensation to be given to foreign owners. No international law is involved, of course, when a sovereign government seizes the property of its own citizens. The international community has no legal basis for complaint when sovereign governments violate every standard of justice with regard to their own citizens. When, however, foreign nationals are affected by expropriatory measures, compensation is due to them according to standard rules of international law. How to obtain compensation, and what type of compensation, are the questions to be discussed here.

Nationalisation is a general, impersonal taking of the economic structure in full or in part for the nation's benefit, with or without compensation. In the case of refusal of compensation or the offer or granting of inadequate compensation, nationalisation resembles confiscation. In the case of the offer or granting of adequate compensation, nationalisation resembles expropriation. The post-war nationalisation acts, with a few exceptions, do not profess to be confiscatory; nevertheless, confiscatory features are predominant in many of them.¹

¹ Nationalisation in Great Britain has been on the whole more moderate and fragmentary than on the continent. There are no confiscatory features in the British measures taken so far. Because of the structural differences between them and the measures in other parts of Europe, and also because of lack of space, British nationalisation measures are not treated here.

While the procedure involved in connection with the return of blocked or vested property is essentially a problem of domestic law, the question of obtaining compensation for nationalised, confiscated, or expropriated property is a question of international law.

In the first problem the *beati possidentes* are the governments of the Western powers, particularly the United States of America; the applicants for return of blocked or vested property are nationals of allied, neutral, and Axis countries. In the second problem involving compensation for expropriated property, usually the governments of the Central European and Eastern European countries are the *beati possidentes* and the claimants are nationals of the Western countries.

II

EQUALITY OF TREATMENT *v.* INTERNATIONAL STANDARD OF JUSTICE

Granted that international law governs the right to compensation and the amount thereof to be awarded a foreigner for nationalised property, the problem remains as to what the standard of international law is in this respect. Does the enactment of legislation infringing on the vested rights of foreigners involve per se the international liability of the State, or using other phraseology, is the foreigner, in the absence of convention or treaty, entitled to a better legislative treatment than the national? Some authorities on international law claim that foreign nationals are entitled to an international minimum standard of equitable compensation.² Others assert that, apart from a convention or treaty, foreign nationals do not enjoy immunity from legislation affecting vested rights, that equality of treatment of nationals and non-nationals is the international law test.³ These conflicting conceptions have clashed in the past before the Permanent Court of International Justice and various arbitration tribunals, and it has been recognised frequently that a State has an international liability to foreign owners of expropriated property even though it acted through non-discriminatory legislation.⁴

² Fachiri, 'Expropriation and International Law', 6 *British Year Book of International Law* 159, 160 (1925); Kaeckenbeeck, 'The Protection of Vested Rights in International Law', 17 *British Year Book of International Law* 1, 16 (1936); 2 Hyde, *International Law* 876 (1945).

³ Baty, *The Canons of International Law* 131 (1930); Brierly, *Law of Nations* 178 (2nd ed. 1936); Williams, 'International Law and the Property of Aliens', 9 *B.Y.B.I.L.* 1, 15 (1928).

⁴ See Herz, 'Expropriation of Foreign Property', 35 *American Journal International Law* 248 (1941); Kaeckenbeeck, *La Protection Internationale des Droits Acquis*, *Recueil des Cours de l'Academie de Droit International* 323, 356 (1937). But cf. Borchard, *The Diplomatic Protection of Citizens Abroad* 125-26 (1915) (maintains that acts of legislation create liability on the part of the State only in exceptional circumstances).

Expropriation involves international law when the person hit by the expropriatory measures is not a national of the expropriating country. Many of the past measures of nationalisation prior to World War II were aimed primarily at foreigners; post-war measures of nationalisation, however, hit nationals and foreigners alike. As a rule there is no discrimination now against foreigners, *prima facie* or otherwise. Foreign nationals after World War II could very seldom protest on account of unequal treatment, or discrimination. Many of the Eastern European countries actually give preferential treatment to foreign nationals as against their own citizens. The mere fact that the expropriating country practices equality among citizens and foreigners does not exempt her from obligations prescribed in the international law.

The first notable case containing a dictum that full compensation must be paid to foreigners irrespective of what is done to nationals is the *Sicilian Sulphur Monopoly Case* in 1838.⁵ Here, for the first time, the principle of an international standard of justice which under certain circumstances would give foreigners more than equality with nationals was opposed to and prevailed over the principle of equal treatment of foreigners.

Similarly, in the *Delagoa Bay Railway* arbitration involving Portugal and the United States where Portugal had abolished a concession previously granted to an American citizen, Portugal was ordered to pay compensation conforming to international standards which included a sum representing the benefit of which he was deprived.⁶

Among the decisions of arbitration tribunals involving the United States, the *De Sabla Case*⁷ contains the most emphatic reiteration of the principle that the taking of property without compensation imposes international responsibility. The arbitrators stated that :

⁵ 28 British and Foreign State Papers: 1837-38 at 1166 (1863), especially Sicilian notes of July 31, 1838 (p. 1202), Sept. 17, 1838 (p. 1215), and Palmerston's reply of Oct. 12, 1838 (p. 1218). See the debate on this case between Williams, 'International Law on the Property of Aliens', 9 B.Y.B.I.L. 25 (1928), and Fachiri, 'International Law on the Property of Aliens', 10 B.Y.B.I.L. 40 (1929).

The British claim was based upon the provisions of the Treaty of 1816 between Great Britain and the Kingdom of the Two Sicilies, conferring upon the British subjects the rights to dispose of their personal property of every kind in any way without the smallest loss or hindrance. Sicily abolished the monopoly in which the British subjects were interested. It accepted the British point of view but only after an impressive British naval demonstration.

⁶ See 2 Moore, *History and Digest of the International Arbitrations*, 1865 (1898).

⁷ Compare the *Shufeldt Case*, 3 Dept. State Arbitration Ser. 851, 877 (1930).
⁷ Decided on June 29, 1933, by the United States-Panama Claims Commission. See Lauterpacht, *Annual Digest of Public International Law Cases*, 1933-34 at 241 (1935).

'It is axiomatic that acts of a Government in depriving an alien of his property without compensation impose international responsibility. Panama has attempted to justify the result reached by asserting that the claimant failed to comply with the duties and take advantage of the remedies created by Panamanian law. This justification the Commission . . . finds to be unsustainable.'⁸

The *Chorzow Factory Case* is perhaps the most significant precedent in favour of the existence of an international minimum standard for treatment of foreign property. This case has always been cited by those who argue against the doctrine of equal treatment. The Permanent Court of International Justice ruled that Poland's expropriation of certain German property in Polish Upper Silesia was in violation of the Geneva Convention of May 15, 1922, concluded between Germany and Poland.⁹

It must be noted that some precedents are available to sustain the position that equal treatment of nationals and non-nationals is the test of international law regarding compensation for expropriated property.¹⁰ Indeed, in the past little unanimity has been reached by international law theorists as to the proper test of

⁸ The turmoil created by the *Italian Insurance Monopoly Controversy* and the corresponding case of the *Uruguayan Insurance Monopoly* produced arguments for the contention that Italy and Uruguay violated international law by abolishing concessions owned by foreign companies and that full compensation was payable by the expropriating State for such abolition. These controversies have not led to decisions by international tribunals and, therefore, no encouragement can be found in them by those who claim that a State has to compensate foreign nationals irrespective of the treatment it may accord to its own citizens. See Fachiri, 'International Law on the Property of Aliens', 10 B.Y.B.I.L. 41 (1929); Rolin, 'Les Droits des Sociétés Etrangères', 44 *Revue de Droit International et de Legislation Comparee* 86 (1912); Scelle, 'A propos de l'établissement du monopole des assurances en Uruguay', 30 *Revue de Droit Public et de Science Politique* 637 (1913).

⁹ P.C.I.J., Ser. A, No. 7 at 22 (1926). The *Chorzow Factory Case* started with an application by the German Government to the court on May 15, 1925, alleging the expropriation by Poland of properties of certain industrial undertakings at Chorzow which constituted a violation of various articles of the Geneva Convention and of Articles 92 and 297 of the Treaty of Versailles of June 28, 1919. Article 6 of the Geneva Convention reads as follows:—

'Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals may not be liquidated in Polish Upper Silesia'.

¹⁰ E.g., Arbitration between the Reparation Commission and the Government of the United States of America, 8 B.Y.B.I.L. 156, 168 (1927). The arbitrators ruled that an American national who invested capital in Germany has no ground for complaint if he is subjected to the same treatment by the Reparation Commission regarding his funds in Germany as are German nationals. This decision is for all practical purposes over-ruled by the Paris Agreement on Reparations of January 14, 1946. See the *Canevaro Case*, Scott, *The Hague Court Reports* 284 (1916).

compensation.¹¹ However, the principle of equal treatment is an outworn concept to-day in view of the fact that nationals of the expropriating States have been offered inadequate compensation, if any at all.

III

MEASURE OF COMPENSATION

What does compensation or indemnification imply? It does not mean restitution of the property taken, but payment for its value.¹²

The American policy with regard to expropriation was best expressed in a note of the former Secretary of State, Cordell Hull, dated July 21, 1938: 'The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future.'¹³ This note of Cordell Hull's issued in connection with expropriation by Mexico of properties owned by American citizens was followed by another note of Cordell Hull's, dated August 22, 1938:

'The fundamental issues raised . . . are therefore, first, whether or not universally recognised principles of the law of nations require, in the exercise of the admitted right of all sovereign nations to expropriate private property, that such expropriation be accompanied by provisions on the part of such

¹¹ Compare notes 2 and 3, *supra*. The International Law Association at its conference in 1926 adopted a resolution which recognises a minimum standard of justice. 34th Conference Report 248 (1926). However, at its conference in 1930, the Association failed to reach any unanimity regarding the measure of compensation. 36th Conference Report 351 (1930). Professor Hatschek in his treatise, *Völkerrecht Als System Rechtlich Bedeutsamer Staatsakte* 397 (1923), limits the obligation to indemnify to the foreigner residing outside the territory of the expropriating State. Steinbach, *Untersuchungen zum Internationalen Fremdenrecht* 132 (1931) limits it to the case where the expropriation is for purely fiscal reasons and not for public utility. Vattel, *Law of Nations* (1758), suggests a distinction between real property which can be regulated freely by the State according to the *lex rei situs*, and personal property, constituting a part of the wealth of the foreigner's nation, governed by international law. A few authorities on international law try to make a distinction between exceptional expropriation of private property for specific purposes and general expropriation changing the whole regime of private property. It is held by some authors that when the institution of private property is abolished, compensation might no longer be justified.

¹² The practice of States in granting compensation for injuries caused by general impersonal legislative Acts has varied. For instance the French Government paid 6,000,000 fr. when slavery was abolished in the colonies to indemnify the slave owners, but refused to indemnify the owners of private telegraphic companies when they were taken over by the government. 49 Duvergier, *Collection des Lois* 144 (1849) and sources cited by Bullington, 'Problems of International Law in the Mexican Constitution of 1914', 21 A.J.I.L. 865 (1927).

¹³ 19 Dept. of State Press Releases 51 (1938).

government for adequate, effective, and prompt payment for the properties seized.^{14 15}

An important distinction must be made between an intentionally illegal act of expropriation and prima facie legal expropriation. The Permanent Court of International Justice has made this differentiation several times. The court has taken the position that apart from the case where a special treaty stipulation expressly prohibits it, expropriation is a lawful faculty or right of the State. The action of the State exercising this right is not one which international law qualifies as illegal or tortious and which therefore obligate the State to restore the damage done, in the form of *restitutio in integrum*. According to the decision of the Permanent Court of International Justice in the *Chorzow Factory Case*,¹⁶ the breach of an express treaty obligation forbidding expropriation made the act a wrongful one for which restitution in kind was due, and if that proved infeasible, full payment of value plus losses sustained. The court stated in this case that expropriation would have brought about merely the obligation to pay compensation for direct losses.¹⁷

The post-war nationalisations violated no peace treaty and, as a rule, were not in contravention of treaty obligations.¹⁸ Therefore, on the basis of notable precedents, compensation for direct losses only would be incumbent upon the nationalising State. An offer of long term bonds in payment of compensation to the former owners

¹⁴ 19 Dept. of State Press Releases 140 (1938).

¹⁵ I Hyde, *International Law*, 711-12 (1945) has this to say on the question of full compensation:

'There is, in fact, much material which inspires the contention that when judicial opinion imposes payment of full compensation within a reasonable time, as a condition to be satisfied by a requisitioning State on account of its action in time of war, the expropriation of alien-owned property in time of peace cannot lawfully be effected on lighter terms.'

For example, a British court declared a compensation offer for 25 per cent. of the value of nationalised Estonian ships as insufficient and regarded the nationalisation as confiscation. *A/S Tallina Laevanhusis v. Tallina Shipping Corp.* [1946] Ll.L.R. 99.

See other cases cited by I. Seidl-Hohenveldern in *Oesterreichische Juristen Zeitung* 1949 Heft 21.

¹⁶ P.C.I.J., Ser. A, No. 17 at 46 (1928).

¹⁷ The decision in the *Walter Fletcher Smith Case*, discussed in 2 Whiteman, *Damages in International Law*, 1408-09 (1937), also makes the distinction between legal and illegal expropriation, illegal expropriation leading to obligation to restore the property.

¹⁸ But cf. the Polish-United States Treaty of 1931, proclaimed by the President of the United States on July 10, 1933. U.S. Treaty Ser., No. 862 (Dept. of State 1933). The Governments of the United States and Poland exchanged notes at Washington on April 24, 1946, in which each of them promises to make adequate and effective compensation to nationals and corporations of the other. 15 Dept. of State Bul. 912, 969 (1946).

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is certainly no adequate compensation, particularly when by subsequent devaluation the value of compensation has been reduced, as in the case of France.

The Swiss Government pioneered in concluding bilateral arrangements with countries whose nationalisation Acts inflicted damage on Swiss nationals. These arrangements contemplate compensation of Swiss claims in Swiss francs by earmarking a part of the export surplus of the nationalising State in its bilateral commerce with Switzerland.¹⁹ Switzerland accepted deferred compensation for its nationals after obtaining a commitment from several nationalising countries (Czechoslovakia and Yugoslavia) to make payment in hard currency, *i.e.*, in Swiss francs. Deferred payment in free currency commanding a premium is certainly more valuable compensation than even cash payment in a controlled, non-convertible currency that is severely undervalued on the free international money market.²⁰ ✓

France also concluded bilateral agreements with Czechoslovakia and Poland, aiming toward the compensation of those French nationals who had been victimised by nationalisation in those countries. The French-Czechoslovak agreement of August 6, 1948, which, however, has not yet been ratified, provides for compensation for French nationals only if the balance of trade between the two respective countries is in favour of Czechoslovakia. In that case, 20 per cent. of the active balance remaining to Czechoslovakia would be earmarked for the redemption of long term obligations issued to French owners of nationalised property in Czechoslovakia.

The agreement of March 19, 1948 between France and Poland is based on the seemingly practical device of utilising Poland's coal export for the satisfaction of French owners of nationalised property in Poland. This is another agreement which was never ratified. Apparently the recognition of the right to compensation for expropriated property is in practice tied to the vehicle of political and economic forces and no longer dependent on purely juridical considerations.

It seems that such considerations of international law have not held back the governments from embarking upon a policy of nationalisation. On the contrary, if they provide compensation at all, this compensation is usually so inadequate that governments of expropriated foreign nationals have taken the initiative in suggesting new avenues for the purpose of securing indemnity for

¹⁹ See N.Y. Times, Sept. 20, 1948, p. 33, col. 5, and Neue Zürcher Zeitung, Sept. 29, 1948.

²⁰ Cf. 36th Report of the International Law Association 351 (1930), and particularly the report drafted by Wittenberg recommending deferred compensation in case of social reforms. *Id.* at 301-48.

the victims of nationalisation.²¹ As will appear below, the compensation usually offered since 1945 consists of long-term obligations of the nationalising State or its agency, inadequate in its amount and in its method of payment.

IV

POST-WAR NATIONALISATION MEASURES

We are concerned here more with post-war measures than with wartime expropriation. The peace treaties with Italy, Hungary, Rumania, and Bulgaria contain clauses that provide compensation for United Nations nationals who suffered property damage from the Axis powers.²² It is expected that the peace treaties with Germany, Austria, and Japan will contain similar provisions. The peace treaties include offers of compensation usually insisted upon by the victorious governments.

The peace treaties concluded with Hungary, Rumania and Bulgaria may be criticised because they provide only for restitution of the property seized or sequestered during World War II and do not prohibit the application of similar measures after the war, and when a *pro forma* restitution had been made. It is possible for these three countries to return property belonging to United Nations nationals as demanded by the peace treaty, and subsequent to the formal return, again seize or sequester it by adopting new measures that are not covered by prohibitory clauses of the peace treaties. This practice is prevalent today in the former Axis countries, and United Nations nationals find no relief in the provisions of the peace treaty or in international law.

Many of the measures of nationalisation prior to World War II

²¹ See note 19, *supra*.

²² Some of the more significant provisions in the peace treaties are the following: Article 74, subdivision E in the Peace Treaty with Italy provides for compensation for property taken for reparation purposes. Article 75 provides for restitution by Italy of property belonging to the United Nations. In the Peace Treaty with Hungary, Hungary is committed by Article 26 to grant compensation for all measures including seizures, sequestration, or control taken by it against United Nations property between September 1, 1939, and the coming into force of the treaty, that is September 15, 1947. Article 27 of the Peace Treaty with Hungary compels Hungary to give compensation, or restoration, if possible, to all those who have been subject to measures of sequestration, confiscation, or control on account of their racial origin or religion. Articles 24 and 25 of the Peace Treaty with Rumania contain identical provisions. Article 23 of the Peace Treaty with Bulgaria is practically identical with Article 26 of the Hungarian treaty and Article 24 of the Rumanian treaty. It is noted, however, that the Peace Treaty with Bulgaria does not contain a special clause as do the treaties with Rumania and Hungary, providing for compensation and restitution of property to persons who have been subject to forced measures on account of their racial origin or religion. U.S. Treaty Ser., Nos. 1648, 1649, 1650, 1651 (Dept. of State 1947).

were aimed primarily at foreigners; post-war measures of nationalisation, however, usually hit nationals and foreigners alike. Foreign nationals after World War II could very seldom protest on account of unequal treatment or discrimination. Some of the Eastern European countries actually give preferential treatment to foreign nationals and States as against their own citizens.²³

(a) *Compensation in France*

Few problems involving international law are involved in the nationalisation of key industries in France after the liberation. Nevertheless, as a comparison to the situation prevailing within the Soviet Union's sphere of influence, it might be useful to glance at the system of nationalisation and the system of indemnification practised in a Western European country.²⁴

In France, first a few single industrial companies were nationalised or confiscated because their erstwhile owners had been accused of collaboration with the enemy. In each instance new nation-wide public corporations were created to take over the business of the former privately owned companies. For instance, the corporations *Electricité de France* and *Gaz de France* replaced the former private companies in the electricity and gas industries. All coal mines came under the control of a single corporation, the *Charbonnages de France*.²⁵ The Constituent Assembly during its five months' existence from November, 1945, to April, 1946, voted for nationalisation of the *Banque de France*, the four large deposit banks, the two largest investment banks, public utilities, coal mines, and two-thirds of the leading insurance companies.

The dispossessed owners are paid compensation for their property and there is no discrimination practised for or against any particular group of owners. The amount of compensation is based on the market quotations of the companies' stock in designated periods during 1944 and 1945 or on evaluations made by special committees based upon the market value of the assets of the companies. For instance, the redemption value of the shares of the *Banque de France* was fixed at 20,029 francs; in August, 1944, they were selling for more than 44,000 francs. The compensation is paid in government securities or in bonds of the public corporations created by the nationalisation laws. The stockholders of the *Banque de France* have been paid in bonds designated as *Obligations de la Banque de France* paying 3 per cent. interest. The

²³ See, e.g., Article 11 of the Hungarian Act of Nationalisation and Article 6 of the Rumanian Act of 1948.

²⁴ See Pinkney, 'Nationalisation of Key Industries and Credit in France after the Liberation', 62 *Pol.Sci.Q.* 368 (1947).

²⁵ Law of May 17, 1946, J.O.: lois 78e Année, 4274-4276 (May 18, 1946).

stockholders of the electricity and gas companies are compensated with bonds of the *Caisse Nationale d'Équipement de l'Électricité et du Gaz* and those of the coal mines with bonds of the *Charbonnages de France*; both of these securities pay 3 per cent. annual interest plus, under certain circumstances, an additional sum varying with the income of the companies. The former owners of the deposit banks and insurance companies are paid in *parts bénéficiaires* issued by the government and paying a minimum of 3 per cent. interest. All of the above securities are amortisable over a period of fifty years except the *Obligations de la Banque de France*, which are to be repaid in twenty years. There were no significant international agreements concluded as a result of the above referred to French nationalisations. It is interesting to note that the law on the nationalisation of the gas and electric industries has taken cognisance of the large foreign interests in these industries.²⁶ The last paragraph of Article 13 of that law says that 'the interests of the shareholders of foreign nationality will be regulated by an order signed by the Ministers of Industrial Production, Foreign Affairs and Finance'. The parliamentary debates indicate that France did not want to incur international liability by violating the rights of foreigners and the rules of international law; it is willing, therefore, to pay more compensation to foreigners than to its own nationals.²⁷

The other countries of the Western European continent have nationalised on a much smaller scale, if at all.

It will be impossible to give at this time a detailed description of the strategy of nationalisation and the type of compensation offered in each of the countries of Central and Eastern Europe. A few examples will be used to illustrate the pattern adopted behind the so-called Iron Curtain.

(b) Compensation in Czechoslovakia

One of the first countries within the Soviet Zone of influence to resort to nationalisation of basic industries was Czechoslovakia.²⁸ The first Czech nationalisation law went into effect on October 27, 1945.²⁹ By the act of nationalisation the Czech State acquired

²⁶ Law of April 8, 1946, *id.*, 2951-2957.

²⁷ See Chargueraud-Hartmann, 'Les Interêts Étrangers et la Nationalisation' *Études Internationales* 331 (1948).

²⁸ See Rado, *Czechoslovak Nationalisation Decrees: Some International Aspects* 41 A.J.I.L. 795 (1947); Oatman, *The Nationalisation Program in Czechoslovakia*, 16 Dept. of State Bul. 1027 (1946).

²⁹ See *Collection of Laws and Regulations of Czechoslovakian Republic*, Nos. 100-03 (1945). Decree No. 100 deals with nationalisation of mines and certain industrial enterprises; Decree No. 101 with the nationalisation of certain enterprises in the food industry; Decree No. 102 with nationalisation of banking corporations; Decree No. 103 with nationalisation of private insurance companies. President Benes issued the decrees on October 24, 1945 and the

ownership of the nationalised enterprises including all their property, assets, and rights. So-called 'national' enterprises were established out of the 'nationalised' enterprises. The national enterprises succeeded to the liabilities of the nationalised enterprises, but the State did not become liable for the debts of any of the nationalised companies. The new national enterprises have the status of independent legal persons. For instance, they are subject to the tax laws and are registered in the Register of Firms kept by the district courts of the appropriate jurisdictions. While the State is not responsible for the debts of the new companies, it receives their surplus earnings.

Compensation is provided for nationalised property³⁰ except in the case of property owned by Germany or Hungary, public or private corporations, persons of German or Hungarian nationality, and persons who engaged in certain activities against the Czechoslovak State. If compensation is denied to a legal person, natural persons having an interest therein who do not belong to the categories mentioned above are compensated in proportion to their interest.

For the purpose of paying compensation, the Economic Fund of Nationalised Property, an independent legal person, was established in Prague.³¹ This fund was authorised to issue interest-bearing securities to be redeemed from the surplus earnings of the nationalised enterprises. The State guarantees the payment of interest and the redemption of the securities. Therefore, it is theoretically possible that although the new companies have no income, the State will take care of the interest payments and the redemption obligations. The compensation in each instance is to start within six months from the day of service of the compensation assessment order. The Minister of Industry in agreement with the Minister of Finance has the power to decide on the method of compensation. From a legal point of view it is interesting to note that compensation claims in case of conflict are decided by administrative and not by judicial tribunals.³²

A special section in the Czechoslovak Ministry of Foreign Affairs has been established to receive foreign claims. Foreign governments whose nationals have claims against the Czechoslovak State often

Provisional Assembly granted blanket approval for them on February 28, 1946. For a complete text of Decree No. 100 see Sharp, *Nationalisation of Key Industries in Eastern Europe* 57 (Foundation for Foreign Affairs 1946).

³⁰ Decree No. 100, § 8.

³¹ 16 Dept. of State Bul. 397 (1947).

³² Compensation proceedings are governed by rules of the decree of January 13, 1928, dealing with administrative process. Collection of Laws and Regulations of the Czechoslovak Republic, No. 81, Decree No. 10 (1928).

act, as is usually done in such situations, as transmitting agents for filing claims. A few countries have concluded special agreements with Czechoslovakia in connection with compensation claims, but up to now foreign owners of property in Czechoslovakia have received little, if any, compensation.

With certain exceptions, the October 24, 1945, decree touched only enterprises employing a specified number of workers.³³ When the second peaceful revolution occurred in March 1948, the 1945 nationalisation decrees were amended and some sectors of the economic life not covered by the prior decrees were subjected to nationalisation. A series of decrees was published on June 2 and 3, 1948, in the 'Collection of Laws and Regulations of the Czechoslovak Republic', enacting various provisions with retroactive effect. Decree No. 114 contains a law passed on April 28, 1948, further nationalising enterprises in certain branches of industry and also contains various amendments to Decree No. 100 published on October 27, 1945. Although this decree was not published until June 2, 1948, it became effective retroactively as of January 1, 1948. Decree No. 115 carried further the nationalisation of enterprises in the food industry and also enacted amendments to Decree No. 101 referred to above. The integrated text of the 1945 and 1948 laws dealing with the nationalisation of mines and of certain industrial enterprises was published on June 2, 1948, as Decree No. 116; the integrated text of the 1945 and 1948 laws dealing with the nationalisation of certain enterprises in the food industry was published on the same date as Decree No. 117.

Wholesale trade, foreign trade, all companies employing more than fifty persons, all building industries, travel bureaus, printing establishments, restaurant and hotel establishments, mineral springs and spas, and companies engaged in the breeding of animals were also nationalised in 1948.³⁴

³³ Some industries employing less than 150 workers and others employing less than 600 were not nationalised. By the end of 1947, nevertheless, Czechoslovakia could report the nationalisation of 8,279 companies employing 1,070,434 persons and doing a yearly business of more than 17,000,000,000 Czech crowns.

³⁴ Decree No. 118 dealing with wholesale trade, Decree No. 119 dealing with foreign trade, Decree No. 120 dealing with enterprises employing more than fifty persons, and Decree No. 121 dealing with building enterprises were all published on June 2, 1948; the laws pertaining to the nationalisation of all these enterprises were enacted, however, on April 28, 1948. Decree No. 122 dealing with travel bureaus, Decree No. 123 dealing with printing establishments, and Decree No. 124 dealing with restaurant and hotel establishments were all published on June 2, 1948; the laws pertaining to the nationalisation of all these enterprises were enacted, however, on May 5, 1948. Decree No. 125 dealing with mineral springs and spas, and Decree No. 126 dealing with companies engaged in the breeding of animals were published on June 3, 1948, but the laws providing for these nationalisations were enacted on May 6, 1948. All these decrees became effective as of January 1, 1948. See also Heaton and Johnson, *Socialism in Western Europe* 37 (Foreign Policy Association 1948).

The compensation features of the 1945 laws remained substantially unchanged. However, the list of classes ineligible for compensation was enlarged.

(c) *Compensation in Poland*

The Polish Act of Nationalisation of January 3, 1946, follows the pattern laid down by Czechoslovakia. Poland took over industry, mines, transportation, banking, insurance, and commercial undertakings.³⁵

Article 2 of the Polish Act of Nationalisation provides for the confiscation (without compensation) of all industrial, mining, communication, banking, insurance and commercial undertakings, if they are beneficially owned by citizens of the German Reich and of the former Free City of Danzig, with the exception of persons of Polish or other nationality, persecuted by the Germans. Heads of certain ministries were given authority to determine which persons and companies come under the above provisions.

Article 7 of the Polish law of nationalisation provides that the owner of an undertaking transferred to the State will receive from the treasury compensation within one year from the day of the receipt by the owner of notification of the final determination of the amount of compensation awarded. It is difficult to ascertain to what an extent this provision of the Polish law has been carried into effect, but apparently so far as Polish nationals are concerned, it has been only a window dressing. Compensation in Poland was to be paid in State obligations, but in exceptional, economically justified cases, cash or other values can be authorised. There is an interesting provision in the Polish law,—not found in the decrees of most of the other States—which provides for a special commission to determine the amount of compensation. Interested persons have the right to participate in the proceedings of these commissions, and the commissions at the request of interested persons have to call qualified experts to evaluate the property transferred to the State. In the determination of compensation the following is taken under consideration :

- (1) general decrease in value of the national wealth ;
- (2) net value of the assets of the undertaking on the day of its transfer to the State ;

³⁵ For the text of the law see Sharp, *op. cit.*, *supra*, note 29, at 75. The Polish Government released on September 30, 1946, a list of 513 firms which are nationalised without compensation, and another list of 404 firms for which compensation is to be paid. According to the 1939 National Year Book of Poland, 32.7 per cent. of the total capital owned by limited liability companies and partnerships was owned by foreign interests. This foreign interest amounted to 103,800,000 zlotys (\$19,600,000).

- (3) decrease in value of the undertaking as a result of war losses and losses suffered in connection with the war and occupation in the period between September 1, 1939, and the time of transfer to the State;
- (4) the amount of investments made after September 1, 1939;
- (5) special factors affecting the value of the undertaking (duration of concessions, licences, etc.)

Some governments, for instance the Government of the United States, have worked out special arrangements with the Polish Government in connection with the international problems created by the nationalisation decrees. The United States reached an agreement with Poland on December 27, 1946, which, however, has not been ratified or entered into effect.

It was agreed that United States nationals should receive compensation from Poland in dollars for their investments made in dollars or in currencies, including zlotys, which at the time of investment were convertible. It was further agreed that the terms of payment of such compensation should be fixed by agreement of the two governments in light of the prospects of the Polish balance of payments when the total amount of compensation is known.

The agreement contains the following provision :

‘No compensation will be granted to U.S. nationals for interest in enterprises which before December 11, 1941, were primarily devoted to the production of arms, ammunition and implements of war, unless such U.S. nationals have been deprived of their right of controlling or managing the enterprise after September 1, 1939, by a unilateral act of German authorities.

‘No compensation will be granted to U.S. nationals for interest in any German enterprise acquired after September 1, 1939, unless such interests were acquired from persons who at the time of acquisition U.S. or other allied or neutral nationals’.

Special arrangements have been worked out between the United States and Poland for compensation with regard to property found to be German because of the fact that the legal *situs* of the nationalised company was in German territory as defined in the Potsdam Declaration of August 2, 1945. It is provided that U.S. nationals whose stock ownership constitutes 51 per cent. or more of the total voting stock shall be compensated to the extent of their interest in property physically situated in the present administrative boundaries of Poland. U.S. nationals whose stock ownership constitutes less than 51 per cent. of the total voting stock shall be

compensated to the extent of their interest if, under standards established by a Polish-American Mixed Commission to be set up, it is found that such investment by U.S. nationals is directed to the control of the enterprise, as evidenced by participation in management, and not only to sharing in the earnings of an enterprise otherwise German.

(d) *Compensation in Yugoslavia*

Most of the industries of Yugoslavia have been placed under State management, or, on the basis of the decree directed against collaboration with the enemy issued on November 24, 1944, have been expropriated by various court decisions.³⁶ Foreign owned property and property of persons who fled Yugoslavia during or after the war was taken over as ownerless property. It was not, however, until December 5, 1946, that nationalisation was decreed by law.³⁷ Ultimately the presidium of the People's Assembly of Federal People's Republic of Yugoslavia or the presidium of the particular Republic concerned decides what enterprises shall be nationalised. In Yugoslavia the State accepts upon nationalisation all the debts of the old companies up to the value of the nationalised enterprises except those arising from 'collaboration, speculation and over-capitalisation'.

The State promised to pay to the owners of nationalised enterprises for the nationalised property on the basis of its net value on the day of nationalisation. Compensation is due in government bonds payable to bearer. The Federal Government can designate by decree the manner and time of the amortisation of these bonds. The Government of Yugoslavia in exceptional cases can order payment of indemnity in cash.

In principle, the Yugoslav Government expressed its willingness to return foreign property to the legitimate owners under certain conditions. Countries with whom Yugoslavia engages in extensive commercial relations, like Switzerland, or who have been holding property of Yugoslavia, like the United States, have been able to work out arrangements for the compensation of the expropriated property of their nationals. The total compensation agreed upon between Switzerland and Yugoslavia was set at 78,000,000 Swiss francs. Most of the payments to be made in connection with the compensation will result from utilisation of Swiss francs due to Yugoslavia from its exports to Switzerland.

³⁶ See Sharp, *op. cit. supra*, note 29, at 23.

³⁷ *Official Gazette of the Federal Peoples Republic of Yugoslavia*, No. 98, December 6, 1946.

It remains to be seen whether the British-Yugoslav Agreement of December 26, 1949, will bring better results to British owners of property than did similar agreements that were concluded with Czechoslovakia and Poland. It may be mentioned that the British-Yugoslav agreement was hitched to the wagon of a five-year trade agreement. Pursuant to an agreement reached in 1948, the Yugoslav Government made a token payment of £450,000 in December of 1949 and will pay the balance in eight annual instalments until £4,500,000 has been paid.

The United States-Yugoslav Claims Settlement³⁸ signed on July 19, 1948, provides for payment to the United States in dollars of the sum of \$17,000,000 in full settlement for American property nationalised or otherwise taken in Yugoslavia.³⁹ Compensation is payable with respect to all property rights and interest with respect to property taken by Yugoslavia between September 1, 1939, and July 19, 1948. Payment by Yugoslavia was made within forty-five days after the signing of the Agreement.

(e) Compensation in Hungary.

Perhaps the most efficient piece of legal draftsmanship is Act XXV of 1948, the first Hungarian nationalisation law. This Act has fewer loopholes than any law of nationalisation in Europe. This law nationalised all companies which employed more than 100 persons at any time on or since August 1, 1946. In addition, 47 specifically listed businesses were nationalised even though they employed less than 100 persons. The 1948 law of nationalisation did not extend to the property (shares, interests) of foreign citizens and legal persons whose domicile is outside of Hungary, provided the acquisition of the property was in conformity with Hungarian laws. The Hungarian decree gave its own definition as to who was to be considered a foreign citizen and as such not subject to nationalisation. A foreign citizen was defined as a person who was not a Hungarian citizen before or whose Hungarian citizenship ceased before August 8, 1931, and who acquired citizenship in a foreign country before the cut-off date. A foreign legal entity could not be considered a foreign national if it belonged to the sphere of interest of Hungarian citizenship of domestic legal entity, provided the domestic interest exceeded 50 per cent.

On December 29, 1949, Hungary published a new law, nationalising all companies, firms, organisations which employ ten persons

³⁸ 19 Dept. of State Bul. 137-40 (1948).

³⁹ The \$17,000,000 paid to the United States is to be distributed by the Government of the United States in accordance with such methods of distribution as may be adopted by Congress.

or more. This new law does not exclude foreigners any longer.⁴⁰ There appears to be a determined drive to fill up the loopholes of the first law and reach assets of foreigners which up to then escaped nationalisation.

The first Hungarian nationalisation law in its section 14 states that compensation is to be prescribed by a separate Act of parliament.⁴¹ The same section 14 also provides that in exceptionally meritorious cases in order to secure a minimum living standard for the former owners and stockholders, an advance can be granted against indemnification. Up to now no bona fide attempt has been made in Hungary to provide for compensation for owners of nationalised property.

(f) *Compensation in Rumania.*

The Rumanian People's Republic by its new constitution of April 13, 1948, provided the basis for nationalisation of private property. These constitutional provisions were first applied under the Bill of 'Nationalisation of Industrial, Banking, Insurance, Mining and Transport Enterprises' of June 11, 1948.⁴²

There is no minimum number of workers specified in Article 1 below which an enterprise would be subject to exclusion from nationalisation, except enterprises in the field of processing metallurgy in which the limit is 100 persons.

Enterprises set up by special agreement between a foreign State and the Rumanian State are also subject to nationalisation except assets belonging to the foreign State itself. Therefore Rumania nationalised the property of foreign citizens and foreign legal persons who made investments in Rumania pursuant to an international agreement concluded between their own State and Rumania. The Rumanian Bill of Nationalisation, however, recognises a so-called 'etatist immunity'.⁴³

Article 5 of the Bill reads as follows :

'Enterprises or parts of their capital belonging to a member State of the United Nations which has acquired this asset in implementation of the Peace Treaty or by the implementation of a commitment of reparation proceeding from the state of

⁴⁰ According to a statement attributed to Minister Gero, this radical nationalisation was enacted because 'foreign imperialists used the owners and leaders of foreign undertakings to build up a spy ring and for sabotage moves'.

⁴¹ This Act has not been published yet.

⁴² Published by the Ministry of Arts and Information (Bucharest, 1948).

⁴³ Art. 5 of the Bill of June 11, 1948, on the Nationalisation of Industrial, Banking, Insurance, Mining and Transport Enterprises, published by the Ministry of Arts and Information, Bucharest, 1948.

war, do not fall under the provisions of the present bill, and are not nationalised.'

✓ Rumania promised compensation to owners and stockholders of nationalised enterprises, and established for that purpose a 'Nationalised Industry Fund', an autonomous legal person, in Bucharest. The 'Nationalised Industry Fund' is to issue securities for the obligations of the nationalised enterprises; these securities can be redeemed only from the net profit of the new national enterprises. ✓ The compensation due to owners and stockholders will be established by Rumanian commissions consisting of three magistrates appointed by the Ministry of Justice.

It was expected that Rumania, like some of the other countries, would conclude agreements providing more adequate compensation to foreign nationals whose government is willing to enter into trade relations with Rumania favourable to the latter. Up to now no progress has been registered.

No compensation will be given to those who left Rumania clandestinely and to those Rumanian citizens who failed to return after the expiration of the validity of their travel documents.

(g) *Compensation in Bulgaria*

Bulgaria, in December, 1946, also adopted a law nationalising most of its industries. Former owners of nationalised enterprises are promised indemnification only for capital ✓ invested and not for the value of the property. On March 9, 1946, the Bulgarian Parliament passed a law providing for confiscation of property acquired illegally or through speculation. The law has been applied to acquisitions of property dating back to January 1, 1935. This later law is used to transfer property to the Bulgarian State whenever this purpose cannot be accomplished by the general nationalisation law.⁴⁴

In Bulgaria, Article 10 of the new Constitution of December 4, 1947, prescribed further nationalisation of enterprises. Enterprises coming under this provision of the Constitution were nationalised by Article 2 of the Nationalisation Bill of 1947 which became effective on December 23, 1947.⁴⁵ Bulgaria subjects to nationalisation the property of foreign individuals and associations; unlike Rumania, it does not exempt from nationalisation property of member States of the United Nations which have acquired these assets as a result of the implementation of the Peace Treaty.

⁴⁴ See Sharp, *op. cit. supra*, note 29, at 27-29.

⁴⁵ For the text of the Bill in English, see *Nationalisation of Industry and Banks in Bulgaria* (Press Dept., Ministry of Foreign Affairs, Sofia, 1948).

Article 4 of the Bulgarian Nationalisation Bill reads as follows :

‘The present law does not apply to enterprises which are the property of foreign nations and fall under the provisions of Article 24 of the Peace Treaty with Bulgaria.’⁴⁶

It appears from Article 4 that since only the Soviet Union falls under the provisions of Article 24 of the Peace Treaty, only Soviet property can escape the effect of nationalisation.

Bulgaria in Article 13 of the Nationalisation Bill offers compensation to owners of nationalised enterprises in interest-bearing bonds of the Bulgarian State. The amount of the compensation is determined on the basis of an evaluation of the assets of the enterprise under the so-called ‘Law for Capital Levy’. According to the language of Article 13, this amount of compensation ‘is reduced by a progressively growing percentage in accordance with a table which will be worked out by the Council of Ministers.’ This language seems to indicate that the principle of less than full compensation is written into the nationalisation law itself. No such provision can be found in any of the nationalisation laws heretofore examined.

V

CONCLUSION

It is expected that ultimately all going business concerns will be subject to nationalisation behind the Iron Curtain. Compensation, if given to all, will be in the form of government obligations or obligations of public corporations created in connection with the nationalisation decrees. There is little sign as yet that the nationalising countries are willing to subject themselves to the decisions of a mixed commission or arbitration body. They are inclined to take the position that the nationalisation decrees are sovereign acts and not subject to foreign interference or the decision of an international body. It appears that the best the average foreign owner can hope for is compensation in interest-bearing securities of the nationalising State.

International lawyers should use their influence to help create mixed commissions or other international bodies for the purpose of deciding such controversial issues as right to compensation and the method of compensation. Unfortunately, as shown above,

⁴⁶ Article 24 of the Peace Treaty with Bulgaria, U.S. Treaty Ser., No. 1650 (Dept. of State, 1947), in its entirety reads as follows:

‘Bulgaria recognises that the Soviet Union is entitled to all German assets in Bulgaria transferred to the Soviet Union by the Control Council for Germany and undertakes to take all necessary measures to facilitate such transfers.’

these questions are usually left with the authorities of the expropriating State. Obligations assumed, or incumbent by international law, should not be permitted to be avoided by pleading the territorial concept of national sovereignty.

Recent experience has shown that in spite of the critical foreign exchange position of most of the nationalising States the foreign property interests affected by these laws could find relief. The solution must be a legal one but with due consideration to political, social and economic realities; the compensation ultimately paid will no doubt represent a compromise.

The following solutions to the vexing problems of how to provide compensation to dispossessed foreign nationals lend themselves for consideration, jointly or in the alternative :

1. A fund could be created out of the blocked or frozen assets of the nationalising State and be used by the governments of foreign victims of nationalisation to compensate these for their losses.

2. Bilateral financial and trade agreements patterned after the initiative of Switzerland, Great Britain and France. Such agreements might not only give adequate compensation to foreign investors but are destined to revitalise international trade.

3. Since the nationalisations discussed here have left a few segments of the respective national economies untouched, the nationalising countries could offer compensation for nationalised foreign property in non-nationalised industries. This type of compensation might be an alternative more satisfactory to the nationalising State which would not be called upon thus to deplete its foreign exchange supply for the benefit of foreign property owners. Such a solution could be sponsored either as part of an international agreement between the interested States or as part of a general code regulating legal consequences of nationalisation.

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THE SCOPE OF SECTION 3 OF THE WILLS ACT, 1861

IN the 5th edition of *Dicey* (1932—edited by Berriedale Keith, in the following quoted as Dicey–Keith) Rule 197 reads :

‘ (Subject to the probable Exception hereinafter mentioned) no will or other testamentary instrument (whether executed by a British subject or by an alien who dies domiciled in England) should be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.

‘ *Exception* : A will which is invalid on account of incapacity or material invalidity according to the law of the testator’s domicile at the time of his death is invalid, although it may have been valid according to the law of the testator’s domicile at the time of its execution.’

In comparison Rule 186 of the 6th edition (1948, by Dr. J. H. C. Morris and seven others, in the following quoted as Dicey–Morris) runs :

‘ No will or other testamentary instrument (made by a British subject) shall be held to be revoked or to have become (formally) invalid, nor shall the construction thereof be altered by reason (only) of any subsequent change of domicile of the person making the same.’

In either edition the comment to the respective Rules emphasises that the rule, *if the words in brackets be omitted*, reproduces verbatim section 3 of the Wills Act, 1861 (24 & 25 Vict. c. 114). A mere glance at the words in brackets makes it clear that the new editor has made considerable changes. To summarise these briefly, a restrictive interpretation of the section has replaced a more extensive one ; the comment which follows the Rule has been shortened and made more precise. It states that the interpretation of the section requires an answer to three different questions which are clearly and succinctly put and dealt with. It is worth while examining whether there was a justifiable reason for the change of view. The disposition of the subject-matter suggested

in the recent edition will be followed and the three questions raised will be dealt with in turn.

I

A. *The First Question* is whether or not section 3 is limited in its application to the wills of British subjects. The quoted text of the Rules shows that the question was formerly answered in the negative and is now being answered in the affirmative. This question has been keenly debated in legal literature even before Dicey's present editor gave new impulse to that discussion.¹

At a time when a great number of foreigners have taken a domicile of choice in this country, owing to the effects of racial and political persecution and of war, the problem should gain rather than lose practical importance. This should be the more so, as many of the more recent immigrants, unlike those of earlier years, belonged, before coming over here, to social circles likely to own considerable property and to make a last will.

There can be no doubt that an extensive interpretation of section 3 which upholds the validity of foreign wills not expressly revoked after a domicile of choice in this country had been established by the testator, is a matter of convenience. This was expressed, in so many words, by Gorell Barnes J. (as he then was) in *The Estate of Jeanne Theodora Groos*,² a case which will have to be discussed in extenso later on. Certainly, an immigrant would be well advised to make a new will in conformity with English law. But if he has not done this, it is infinitely more likely that he wished his former dispositions to stand rather than that he refrained from doing anything in the belief that the old will had become invalid anyway and that he has now chosen intestacy according to English law. An extensive rather than a restrictive interpretation is, therefore, most likely to be in accordance with the wishes of the testator.³

However, the question of convenience is not legally relevant to our problem of interpretation. It should not be forgotten that

¹ Answer in the negative: Dicey-Keith, as stated above; Westlake, 7th ed., p. 122; Wolff, p. 597 f.; Schmitthoff, 2nd ed., p. 239; Parry, *Law of Succession*, p. 12; Bentwich, *The Law of Domicile in its Relation to Succession*, pp. 16, 119; Breslauer, *The Private International Law of Succession*, pp. 157, 158; answer in the affirmative: Dicey-Morris, as stated above; Cheshire, 3rd ed., pp. 691 ff.; Foote, p. 301.

² [1904] P. 269 at pp. 272-3. Even J. H. C. Morris, the General Editor of Dicey's 6th ed. and the editor responsible for Rule 186 has stated in 62 L.Q.R. at p. 174: 'There appears to be no conceivable reason why sections 1 and 2 should be confined to Wills of British subjects'.

³ In the United States of America, therefore, Common Law has been revised, so as to comply with the presumptive wishes of the testator, by the statutes of many States following proposals of the 'Conference on Uniform State Laws' (quoted by Breslauer, p. 109).

an English statute must not be interpreted with a view to the convenience of the result and that 'the office of the Judges is not to legislate, but to decide the expressed intention of the Legislature, even if that intention appears to the court injudicious'.⁴

B. Assuming for the moment that there is no judicial authority for the interpretation of section 3 one finds that the arguments for and against its restriction to the wills of British subjects are nicely balanced.

Sections 1 and 2 of the Act are *expressis verbis* limited to British subjects. This fact, by itself, may equally justify

- (1) the conclusion that section 3 should be similarly restricted in scope by analogy, and
- (2) the argument that it should not be so limited because section 3 does not contain any such qualification; that it, therefore, should be extensively interpreted according to the 'natural meaning of the language'.⁵

The case for restriction by analogy is, however, considerably strengthened by the fact that the Act is entitled 'An Act to amend the law with respect to Wills of personal estate made by *British subjects*'. The legal importance of the title to a statute and, accordingly, its significance for the interpretation of the individual clauses has undergone certain changes.⁶ Normally, one will be justified in assuming that the scope of the statute does not exceed what is indicated by its title, though there are undoubtedly instances where it has been held that individual clauses had a far wider application.⁷

The matter of the title of Lord Kingsdown's Act is bound up with that of the history of the Act. Every student knows that the case of *Bremer v. Freeman*⁸ and its surrounding circumstances caused Lord Kingsdown to propose the Bill which ultimately became the Wills Act, 1861. He and others had felt that the law as it stood was apt to cause hardship to British subjects domiciled abroad. It is an old rule of statutory interpretation⁹ that one should discover the mischief and effect for which the law did not provide and what

⁴ See *River Wear Commissioners v. Adamson* (1877) 2 App.Cas. 743 at p. 764, and similarly in many other cases.

⁵ Schmitthoff, p. 239.

⁶ For the old view that it was quite irrelevant, see *Att.-Gen. v. Lord Weymouth* (1743) Ambler 22; for modern developments, see *Kenrick v. Lawrence* (1890) 25 Q.B.D. 99, 104; *Fielden v. Morley Corp.* [1899] 1 Ch. 1, 3; for a detailed discussion and further authorities for both points of view, see Wilberforce, *Statute Law*, 1881, pp. 273-6.

⁷ See, e.g., *Ex p. Gorely* (1864) 4 De G.J. & S. 481.

⁸ (1857) 10 Moo.P.C. 306.

⁹ Derived from Coke, *Heyden's Case*, Co.Rep. 7b, quoted by Lord Blackburn in *River Wear Commissioners v. Adamson* (1877) 2 App.Cas. 743 at the passage p. 764 already cited in note 4.

remedy Parliament resolved to cure the disease. But even so, there is the possibility that the 'doctors' were by no means in agreement on either the diagnosis or the cure for the illness. 'A statute aiming to improve the legal situation X, and saying so may, apart from that, help to remove some other inconvenient rule Y',¹⁰

In any case one should not refer to speeches of individual legislators, as has been done by Cheshire¹¹ who states that 'though not admissible as evidence, it is noteworthy that in his speech to the House of Lords on the second reading he (Lord Kingsdown) spoke exclusively of England, Ireland and Scotland, and never once hinted that he wished to legislate for the wills of foreigners'. Such research into the motives of Parliament is inadmissible, as was authoritatively stated by Viscount Haldane L.C. in *Vacher & Sons, Ltd. v. London Society of Compositors*,¹² as follows: 'I do not propose to speculate on what the motive of Parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the legislature has finally expressed its conclusion'.

In favour of an extensive interpretation of section 3 is the fact that the clause is not specifically restricted to the wills of British subjects. Against this it has been argued¹³ that even those authors who refuse to restrict the scope of the clause to British subjects do not extend it to the wills of foreigners who die abroad.¹⁴ However, that argument does not appear to be particularly strong: obviously English legislation cannot be interpreted as having extra-territorial effect in the absence of an express provision to that effect.¹⁵ Section 3 cannot rightly be construed, therefore, as relating to the wills of foreigners dying domiciled abroad. The fact that one may interpolate into a statute words which bring it into accordance with a recognised general principle does not justify other interpolations of a much more doubtful character.

It may even be permissible to argue that an interpretation should be favoured which complies with rather than militates against general principles of law. As generally it is domicile, not nationality that counts in English private international law the exceptional application of the law of nationality should be interpreted restrictively rather than extensively.

¹⁰ Wolff, p. 598.

¹¹ P. 691.

¹² [1913] 2 A.C. 107 at p. 113.

¹³ Dicey-Morris, p. 840.

¹⁴ See wording of Rule 197 in Dicey-Keith, also *ib.* at p. 820; Schmitthoff, p. 239.

¹⁵ Schmitthoff, p. 240.

Lastly it must be mentioned that there is not much scope for an application of section 3¹⁶ if it is restricted to the wills of British subjects. Cheshire explains the clause as follows¹⁷:

‘The probable object of the third section was to make it perfectly clear that a will valid under either of the first two sections should not be adversely affected by a later change of domicile. The section merely states more explicitly what had already been stated in the earlier sections.’

Faulty as the draftsmanship of the Wills Act, 1861, undoubtedly is, it seems hard to impute to the legislator such an object in drafting this section of the statute. It has been pointed out, however, by Dicey-Morris¹⁸ that there could be cases where section 3 is applicable even if it applied only to British testators: ‘Thus, if a British subject domiciled in Scotland makes an unattested holograph will in England, and dies domiciled in England, his will would not be valid under section 2, because it was not valid by the *lex actus*’.

C. So much for the arguments for and against the different interpretations of section 3 without reference to authority. It has to be strongly contended, however, that there is no room for so free an interpretation as long as *The Estate of Groos*¹⁹ is not overruled, for this case does not contain a mere dictum, but is an authority in point which settles the matter.

The brief facts of the case were as follows: The deceased and her husband, both then Dutch subjects, domiciled in Holland, married on November 19, 1868, at Utrecht. The deceased had made her will before an Utrecht notary one week before marriage on November 12, 1868. Later on husband and wife acquired a domicile of choice in this country, and when after the death of the wife a grant of probate was applied for, the question was raised whether the will had been revoked by the deceased’s marriage, as is the rule of English law.²⁰

The learned judge, (subsequently President) Gorell Barnes J., dealt with the problem (at p. 272) as follows:

‘After looking into the authorities, I have some doubt whether apart from section 3, this will should be treated as invalid, inasmuch as it was a good will at the time it was made

¹⁶ In so far as it refers to the *validity* of wills. In so far as it refers to construction, it can now be considered as settled that s. 3 merely repeats what follows from general principles: see Dicey-Morris, Rule 183, and Part III of this essay.

¹⁷ P. 691.

¹⁸ P. 840, line 8 from top and following lines.

¹⁹ [1904] P. 269.

²⁰ Section 18, Wills Act, 1837.

and valid as long as the parties were domiciled in Holland. Under these circumstances, might it not reasonably be held that the will remained valid up to the time of the change of domicile, and that it ought not to be treated as invalidated subsequently owing to change of domicile? To hold otherwise would be equivalent to saying that the law of the after-acquired domicile was to work back and affect a will at a time when the law of the country where the will had been made shows it to have been a good will. Having considered the authorities, *I hold that section 3 of the Act may reasonably be construed as applicable to a case such as this.* That so to hold is a matter of convenience cannot be doubted. That the case may be held to be within the general terms of section 3 is equally beyond doubt. And it does not seem reasonable to hold that in this case section 3 is to be limited merely because, in the title, the Act is described as an Act to amend the law with respect to wills of personal estate made by British subjects. I am of opinion that the Act ought not to be construed in the restricted sense. This will may, *therefore*, be admitted to Probate'.

Let us see how the present editor of *Dicey*,²¹ following a similar argument of Cheshire,²² deals with this case. He states that the learned judge's opinion was not necessary to the decision of the case—

'The question was whether the will of a Dutch lady domiciled in Holland was revoked by her subsequent marriage to a domiciled Dutchman, she having died domiciled in England. Since the testatrix was domiciled in Holland at the moment of marriage this question depended on Dutch law²³ by which marriage does not revoke a will. It was, therefore, unnecessary to have recourse to section 3 at all in order to admit the will to probate; and the learned judge was plainly prepared to decide the case on general principles without reference to the section'.

With all deference, it is submitted that this reasoning does not render due respect to the words of the learned judge and is not in accordance with sound principles of interpretation.

It can readily be admitted that the case *might* have been decided correctly on general principles with the same result, because in English private international law revocation of a will by marriage is classified as a matter of matrimonial law determined

²¹ At pp. 840-1.

²² P. 691.

²³ Rule 185, Exc. 2, p. 837.

by the law of the country where the testator was domiciled at the date of marriage.²⁴ There is no quarrel with Dicey-Morris's or Cheshire's statements to that effect. But it is not true that the judge was 'plainly prepared' to decide the case on such principles. It is submitted that his speech shows clearly that he had a certain sympathy with and inclination to the correct view on general principles of private international law which might have led to the same decision, but that for him 'some doubt' remained and he was *not* prepared to make such principles the basis of his judgment. On the contrary, he decided the case *in so many words* on the basis that section 3 of Wills Act, 1861, was not confined to the wills of foreigners.

The words '*I hold*' and '*therefore*' should exclude argument about this.

The question of principle remains whether in spite of this very distinctive way in which the learned judge expressed himself it can properly be said that what he held was, in fact, a dictum only, because the decision can be justified on other grounds.

It is submitted that this question has to be answered in the negative. Let us consider those cases where the court clearly and openly based its judgment on *two* different grounds. If Dicey-Morris's reasoning was correct, it could certainly be said in such a case that the speeches of the judge or the judges as to the one or other ground (or perhaps as to both of them?) were dicta only because the decision was justifiable on the basis of the other ground stated. There is, however, ample authority that such a conclusion cannot be drawn. Reference may be made to *Cheater v. Cater*²⁵ where Pickford L.J. said²⁶:

'that it is a distinct statement of the law and not a dictum. If a judge states two grounds for his judgment and bases his decision upon both, *neither of those grounds is a dictum*'.

Equally in *London Jewellers, Ltd. v. Attenborough*,²⁷ Greer L.J. said²⁸:

'In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the *ratio decidendi* and neglect the second, or to pick out the second reason as the *ratio decidendi* and neglect the first: we must take both as forming the ground of the judgment'.

²⁴ *Re Martin* [1900] P. 211, 240.

²⁵ [1918] (C.A.) 1 Q.B. 247.

²⁶ At p. 252.

²⁷ [1934] (C.A.) 2 K.B. 206.

²⁸ At p. 222.

Surely, if it is inadmissible to discard one of two alternative reasons given, how much less possible is it to discard the *only* reason given *expressis verbis* as decisive in addition to a mere inclination to an alternative reasoning involving some doubt? Conclusive as this deduction from the cases quoted seems to be to the present writer it can, and may, be further enforced by reference to a classical definition on the concept of an authority as against a mere dictum. Thus Halsbury²⁹ summarising a long line of authorities states :

‘ that that part alone of a decision of a court of law is binding upon courts of co-ordinate jurisdiction and inferior courts which consists of the enumeration of the reason or principle upon which the question before the court *has really been* determined ’.

Surely, Gorell Barnes J. determined the validity of Mrs. Groos’s will by his interpretation of section 3 of the Wills Act, and not on general grounds. His interpretation, therefore, is now law.

II

When quoting the words in which the present editor of *Dicey* deals with *The Estate of Groos* we did not mention that he adds the following remark :

‘ Moreover there is no suggestion in the judgments of the Court of Appeal in *Re Martin*³⁰ that the will in that case (which was made by a Frenchwoman domiciled in France at the time of making her will, but in England at the time of her subsequent marriage) might have been saved from revocation by section 3 ’.

Does that mean that there is a conflicting authority on the question discussed above? This is Dicey-Morris’s first question. It does not. There is a fundamental difference between the two cases mentioned in so far as the marriage of Mrs. Groos was concluded when she was domiciled abroad whereas in *Re Martin* it was held by the majority of the Court of Appeal that the domicile of the husband, and consequently that of the wife, at the time of the marriage was English. The issue in *Re Martin*, clearly distinguishable from that in *The Estate of Groos*, has to be considered as an illustration of the second question put in Dicey-Morris’s comment to Rule 186, *viz.* : whether or not section 3 is meant to uphold a will made at the place of a foreign domicile even if there

²⁹ Vol. 19, p. 25.

³⁰ [1900] P. 211.

were other factors apart from the change of domicile owing to which that will is to be held to be revoked or to have become invalid under English law?

This question is answered in the negative by Dicey-Morris and his opinion has found expression in the rule itself by interpolating the word 'only'. Dicey-Morris gives the following example:

'If a British subject domiciled in England makes a will executed according to the Wills Act, 1837, and dies domiciled in Italy having made an unattested holograph will, valid by Italian law, in which he revokes all former wills, it surely could not be contended that section 3 saves the first will from revocation: moreover there is authority that it does not do so'.³¹

Dicey-Morris's view is certainly sound and is in accordance with authority. Numerous other examples to the same effect might be given. It is submitted, however, that there is no real conflict in this respect. None of the authors giving a less restricted interpretation to section 3 have gone to such unreasonable lengths as to contend that a will made before the change of domicile must remain valid *whatever happens after* that time. Section 3 states no more than that the change of the law governing succession in general which results from the change of domicile shall not invalidate the will. If a *new fact* intervenes after the change of domicile section 3 does not operate.

Dicey-Morris assumes that *The Estate of Groos* and *In the Goods of Reid*³² suggest a more far-reaching interpretation of the clause. In fact they do not. In neither case did any new fact happen after the change of domicile. Quite rightly Sir J. P. Wilde, in the last-mentioned case,³³ said that the testator

'did nothing after he came to England which had the slightest effect on the validity of the will, either by the law of England or by the law of Scotland'.

Dicey-Morris argues³⁴:

'If section 3 is to receive the wider interpretation suggested by the dicta in these two cases (*Groos* and *Reid*), it is hard to see why it did not save the will in *Cottrell v. Cottrell* from revocation'.

Surely this conclusion cannot be drawn from either of these cases.

The obvious explanation of the very simple judgment in the *Cottrell Case* is that the first, English, will of Cottrell was *not*

³¹ (1872) L.R. 2 P. & D. 397.

³² (1866) L.R. 1 P. & D. 74.

³³ *Ibid.* at p. 76.

³⁴ At p. 842.

revoked by the fact that he established a domicile of choice in Italy, but *was* revoked by the fact that after this change of domicile the testator made a second will in Italian form wherein he stated :

‘I erase, revoke, and annul every other act or last will which I may have made, willing that this my present will shall receive all its efficacy and execution.’

The case had nothing whatever to do with section 3 of Lord Kingsdown’s Act.

III

Dicey-Morris’s third and last question is whether the scope of section 3 is confined to the provinces of formal validity and the construction of wills or extends beyond this to any case in which the validity of a will may be queried, especially for lack of capacity of the testator or on grounds of material invalidity. Dicey-Morris, again deviating from Dicey-Keith, restricts the application of section 3, as is shown by the insertion of the word ‘formally’ before ‘invalid’ into the text of Rule 186.

However, when reading Dicey-Morris’s comment to his rule one finds that he confines the effect of his restrictive construction of section 3 to the province of material validity. As to capacity he says :

‘Personal capacity is probably governed by the law of the testator’s domicile at the date of the will. Therefore, if the testator has testamentary capacity at the date of the will but not at the date of his death, the will is valid on general principles, and it is unnecessary to have recourse to section 3.’

Reference is made to Rule 179 (where the principle as to the capacity of the testator has been stated) and to the comment thereto.³⁵ The question whether this principle is correct is admittedly not easy and rather controversial,³⁶ but is not within the scope of this article. It may suffice to say that on consideration it appears that there is no authority in point and that Dicey-Morris’s view is sound.³⁷ Consequently the question whether section 3 of the Wills Act, 1861, was meant to extend to the personal capacity of the testator becomes merely theoretical and not worth discussing.

³⁵ P. 819.

³⁶ See Dicey-Keith, p. 823; Wolff, pp. 591-2; Cheshire, pp. 680-2; Schmitthoff, p. 228; Breslauer, p. 90.

³⁷ Answered in the affirmative also by Cheshire, pp. 681-2; Wolff (doubtful), p. 597: in the negative by Dicey-Keith, p. 823; Westlake, p. 122. *Quære* whether it may be possible to combine both views in a way which has the effect that the will can be considered valid in any case?

With regard to the material validity of the will³⁸ the view of Dicey-Morris³⁹ is based exclusively on the fact that the other clauses of the Act refer to formal validity. He says:

‘Hence it is natural to restrict section 3 to matters of form and construction, and no case appears to suggest that this view is wrong. It is submitted, therefore, that section 3 only applies to formal validity and construction and that it does not extend to material validity or to the personal capacity of the testator. Material validity is governed by the law of the testator’s domicile at the date of death⁴⁰ and it is *unlikely* that the legislature intended to alter this rule in a statute dealing mainly with matters of form.’

It is submitted that the view of the principal opponent of this view, Westlake,⁴¹ was correct for three reasons:

(A) There is no doubt that the wording of section 3 does not justify the restriction to formal invalidity. Even as early as 1861 it was not unknown that a will (or a contract) might be either *formally* or *materially* invalid.

(B) Section 3 refers not only to subsequent invalidity but states that ‘No will or other testamentary instrument shall be held *to be revoked* or to have become invalid’.

Wolff,⁴² cautiously trying to circumvent the difficulty of construction here discussed, draws the conclusion that section 3 applies ‘to the effect of events which under some laws may be deemed to operate as a revocation of the will’. It appears, in principle, that such revocation can reflect on either the formal or material validity of a will. Let us try to find examples which prove this statement.

(a) X is a domiciled Utopian, the law of which country does not admit revocation of a will by the testator’s burning, tearing or otherwise destroying the same. He makes a will in Utopia, subsequently tears it up, then acquires a domicile of choice in this country and dies. The will is not ‘held to be revoked’ owing to section 3 of the Wills Act, 1861.⁴³

³⁸ Excluded from the scope of s. 3, according to Dicey-Morris, as stated above, and according to Dicey-Keith, *Exception to Rule 197* and comment at p. 823 (expressing doubts); Breslauer, *Private International Law of Succession*, p. 157; included, according to Westlake, p. 122; Schmitthoff, p. 239.

³⁹ P. 842.

⁴⁰ A statement for which there is ample authority; see Dicey-Morris, p. 827, n. 51.

⁴¹ P. 122.

⁴² P. 597.

⁴³ It is respectfully submitted that the explained distinction has been disregarded by Cheshire, 3rd ed., pp. 708-711, where it is discussed, in general terms and without reference to s. 3 of Lord Kingsdown’s Act, whether revocation was governed by the *lex domicilii* of the testator at the time of the revocation or at the time of testator’s death. His conclusion that the time of revocation is decisive, though sound in its practical consequences, would appear to be contrary to the principle of the English Private International Law of Succession if it was not for the saving grace of s. 3.

(b) Take the facts of *The Estate of Groos*, discussed above, but leave out of consideration the question of Mrs. Groos's nationality. Now assume for the sake of argument that revocation of a will by marriage was *not* classified in English private international law as part of the law of marriage, but as part of the law of succession and determined by the law of the domicile at the time of death. This assumption, though now held to be contrary to English law,⁴⁴ is certainly arguable, considering that the statutory rule in question is to be found not in any statute dealing with marriages, but in the Wills Act, 1837; also the matter was still not decided in 1861. If this were assumed, then there could be no argument on the question whether or not section 3 need be referred to for the decision of cases of this kind. Clearly such a will would have to be considered 'not revoked' owing to section 3, and this time it would be its material, not its formal validity which was in question.

If, however, those words of the clause which refer to revocation could possibly refer to cases of material validity, the same should be the case with regard to other cases of material validity not involving revocation.

(C) The third argument for the interpretation of section 3 is to be taken from the following words of the clause 'nor shall the construction thereof be altered by reason of any subsequent change of domicile'. To understand the significance of this addition it is necessary to define the meaning of the word construction. There is no statutory determination of the word in the Interpretation Act, 1889, or elsewhere. Some of the legal encyclopædias are inclined to treat it as synonymous with interpretation.⁴⁵ However, the sounder view gives a more extensive meaning to it than to the word interpretation by including the legal effect of a will (or contract). This more extensive view has been followed by both Dicey-Keith and Dicey-Morris, though it is astonishing that this has been made clear in the index rather⁴⁶ than in the text itself.

It may be as well to make the terminological point somewhat clearer, by reference both to a learned writer and to a case in point.⁴⁷ The German author Andreas von Tuhr in his *Allgemeine Teil des Deutschen Bürgerlichen Rechts*⁴⁸ states :

⁴⁴ *Re Martin* [1900] P. 211, 240.

⁴⁵ Stroud, *Supplement*, p. 222; Wharton, 14th ed., p. 240.

⁴⁶ 5th ed., p. 1031; 6th ed., p. 911 (lines 4, 5 from bottom); and see Shumaker-Langsdorf's *Encyclopædia*, 3rd ed., p. 592.

⁴⁷ The author is very much indebted to Mr. O. Kahn-Freund, LL.M., DR.JUR., Barrister-at-Law, Reader in Law in the University of London, for drawing his attention to the points made in this connection, as well as generally for much most valuable advice and encouragement.

⁴⁸ Munich and Leipzig, 1914, and 64, p. 543 f., and note 49 at p. 544.

‘The contents of a declaration of intention are determined by interpretation After interpretation has been completed the further task, to be distinguished from interpretation, arises to consider juridically and to classify what had been found—by interpretation—to be intended. This classification is necessary so as to be able to apply the legal rules, mostly of a “dispositive” (non-coercive) nature which the statutes contain as regards the various types of legal acts. These rules serve the purpose of deciding disputable points of which the parties usually do not think when acting. This does not belong to interpretation proper. The word “interpretation” (Auslegung) is, however, often used consciously or unconsciously, in a more far-reaching meaning so as to describe the activity, composed of interpretation proper, legal consideration and supplementation (“Ergänzung”), through which the whole effect of a legal act, whether intended or not, is being determined’.

This, indeed, is construction.

A good example derived from case law is to be found in *Re Cunningham*.⁴⁹ Here, in the case of the will of a testator who died domiciled in France, the question had to be decided whether the shares of two residuary beneficiaries who had died before the testator had lapsed or had accrued to the surviving legatees.

Eve J. held that :

‘the domicile being French and there being no sufficient indication in the will, either express or implied, that the testator desired that it should be construed by English law, the *prima facie* general rule applies and the will must be considered by French law’,

according to which there was no lapse, but the whole residue went to the survivors. This is clearly not a mere matter of interpretation, but a case of construction in the wider sense of the term although it was described as a matter of construction by the learned judge.

Our statement that the construction of a will is not confined to its interpretation is also in accordance with the terminology of the Wills Act, 1837, which is the principal Act dealing with wills.

Section 24, for instance, reads :

‘And be it further enacted that every will shall be *construed* with reference to the real estate and personal estate comprised in it, *to speak and take effect* as if it had been

⁴⁹ [1924] Ch. 68.

executed immediately before the death of the testator unless a contrary intention shall appear by the will'.

Here construction is said to determine the effect of the will. It is true that one might possibly argue that the last nine words of the clause make it, and the corresponding sections 27, 30, 32 and 33 mere rules of interpretation. But corresponding words are not to be found in section 31, under which a certain devise

'shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied'.

This is a clear case of the legal effect of a devise operating independently of the actual intention of the testator and not as a mere consequence of such intention ascertained by interpretation; this is called a rule of construction by the statute itself.

As a matter of fact according to sound principle the same law should govern, both interpretation and legal effect operating *ipso iure*. This has been very well expressed in Rabel's *Conflict of Laws* where he says (with regard to contracts, but applicable equally to wills) ⁵⁰:

'Most courts do not hesitate to include interpretation of a contract in the law which governs the whole of the contract. They also apply this law to the question who obtains rights to the contract, and what is the object of these rights. For it is plainly not feasible to consult two different laws for determining the extent of the contractual duties, the one when they are to be inferred from a construction of the parties' intention, implied in fact, and the other when they flow from legal rules completing an agreement, implied in law'.

Having so defined construction we have to remember that the legal effect of a will is not dependent on such construction exclusively, but is also dependent on its material or essential validity or invalidity. See Dicey-Morris's comment to his Rule 182 ⁵¹:

'A will made by a person under no testamentary incapacity and duly executed or formally valid may nevertheless be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect . . . such invalidity arising from the nature of the bequest is termed material or essential invalidity'.

⁵⁰ Vol. 2, p. 530. In fact it appears that in the law of contract the separation of questions of interpretation and of legal effect (especially with regard to non-coercive provisions) has been avoided, as a rule.

⁵¹ Pp. 827-8.

What difference remains then between a legal effect to be drawn from the construction of a will and that which results from its material or essential validity or invalidity? It is submitted that the difference is exactly the same as that between *jus cogens* and *jus dispositivum*, terms familiar to Romanists and continental lawyers, but not common in English legal nomenclature.⁵² A rule which has a given operative effect, but is not binding upon the parties, belongs to the province of construction, and a rule which is binding, to that of essential validity.

But the boundaries between the two provinces are fluid; often enough there are doubts whether or not a rule of law may or may not be made inoperative by a clause in a contract or will. It seems unsound to increase the danger of such problems of delimitation by an interpretation of section 3 which allows legal effects ascertained by way of construction to stand, but, contrary to the wording and without cogent reason, allows the effects of English law belonging to the province of essential validity to invalidate the will by reason of the subsequent change of domicile of the maker.

The present writer when still adhering to the view he now repudiates has remarked⁵³ :

‘If Westlake’s view were right the courts of the country where the deceased had his last domicile would probably rely on the principle of public policy to avoid the necessity of applying testamentary provisions which are essentially invalid according to their law’.

They might indeed do this—but they would be wrong. The undue extension of the principle of public policy with the result that it covers all or most of the province of municipal *jus cogens* should be strongly resisted. ‘The only general barriers to foreign law in the sphere of private international law that may prove indispensable, arise from the depths of basic moral conceptions which in our times naturally include those of fundamental social justice’.⁵⁴

It seems appropriate to check the result arrived at with the authorities on material or essential validity on which Dicey-Morris’s Rule 182 is based. He lists eight of them.⁵⁵ The majority deals with cases where continental rules on *portiones legitimæ* and

⁵² See more detailed explanation in Breslauer, *Private International Law of Succession*, pp. 118 ff.

⁵³ *Ibid.*, p. 157.

⁵⁴ Rabel, *The Conflict of Laws*, Vol. 2, p. 482.

⁵⁵ P. 827, n. 51.

similar rules were involved.⁵⁶ The question in such cases could never be whether a foreign will remained valid, but whether it remained invalid. Section 3 of the Wills Act, 1861, does not apply. Suppose, however, that a testator domiciled in Eire makes a will not providing for his wife and later acquires a domicile of choice in this country. Then, the question would arise, whether section 3 as interpreted here has or has not precedence over section 1 of the Inheritance (Family Provision) Act, 1938,⁵⁷ which according to its wording refers to all persons who die domiciled in England. But this is another question which need not be discussed here.

Then there are two cases referring to charitable bequests.⁵⁸ Such cases are good examples for the soundness of our view. Supposing the testator, whilst domiciled abroad, makes a charitable bequest which does not comply with the detailed rules on such bequests developed in English law? Why should such a bequest not hold good after the testator's change of domicile? Are these detailed rules really so sacrosanct that charitable bequests validly made according to the law of the testator's domicile at the time of making the will could not properly be considered as remaining valid by section 3 after the testator has moved his domicile to this country? In any event, neither of the two cases suggests that section 3 could not be applied to the validity of such bequests.

There is lastly the much criticised case of *Re Priest*.⁵⁹ We need not discuss the case in detail here nor decide whether it is sound law, or whether it is relevant to the question of essential validity at all rather than belonging to the province of formal validity. Bennett J. in *Re Priest* did not hold—as indeed he might have done—that the will in question was a will valid under Scottish law but invalid under the law of the testator's domicile at the time of death, viz., English law—an interpretation which would have necessitated the consideration of sections 2 and 3 of Lord Kingsdown's Act. He said :

‘It is impossible for me, on the evidence, to conclude that the testator in the present case intended to make an unattested

⁵⁶ *Thornton v. Curling* (1824) 8 Sim. 310; *Campbell v. Beaufoy* (1859) Johns. 320; *Re Gross* [1915] 1 Ch. 572; *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377.

⁵⁷ 1 & 2 Geo. 6, c. 45.

⁵⁸ *Whicker v. Hume* (1858) 7 H.L.C. 124; *Macdonald v. Macdonald* (1872) 14 Eq. 60.

⁵⁹ [1944] Ch. 58. It is submitted that the just criticism of the case by R. M. W. in 60 L.Q.R. 114, Kahn-Freund in 7 M.L.R. 238, and Falconbridge, *Selected Essays on Conflict of Laws* (1947) 476 ff., has by no means validly been refuted by Morris in 61 L.Q.R. 124, 62 L.Q.R. 172-3, and Dicey-Morris, p. 830 (n. 64).

holograph will disposing only of personal property which was to have legal operation and effect by force of the combination of the law of Scotland relating to holograph wills and section 2⁶⁰ of Lord Kingsdown's Act.'

Thus the case has no significance for the problem under discussion and does no more than the other cases mentioned to prejudice the result arrived at, *viz.*, that section 3 of the Wills Act, 1861, refers to material no less than to formal validity.

IV

The foregoing discussion is certainly not of an academic nature. The imperfect and ambiguous drafting of Lord Kingsdown's Act is apt to give serious trouble in practice and to lead to very unfortunate results.

If printed evidence be needed for this statement, it can be found in Falconbridge's *Essays on the Conflict of Laws*.⁶¹ Falconbridge discusses⁶² the same questions—and others. He mentions that the Canadian provinces of Saskatchewan and Manitoba have adopted a revised version of Lord Kingsdown's Act, drafted by himself, and concludes by suggesting a still better and more refined Act to amend the Wills Act, 1837. It is clear from the context that his version is not confined to the wills of British subjects. He inserts the word 'only' into the draft of section 6 of his Act which otherwise is identical with section 3 of Lord Kingsdown's Act. Lastly, though he remarks that 'the question whether that section should be substantially revised, or limited in its application, will require "further consideration"', it appears to the present writer that in the context his section 6 is bound to cover the essential, or as he puts it the intrinsic validity of a will.

W. BRESLAUER.⁶³

⁶⁰ And/or s. 3.

⁶¹ Toronto, 1947.

⁶² Pp. 463-5, 469-476.

⁶³ London.

NOTES ON SOME ASPECTS OF THE LEGAL POSITION OF INTERNATIONAL AIR CARRIERS

DURING the twenty years between the two World Wars civil aviation made rapid strides and air transport became a normal mode of carriage, although trans-Atlantic and trans-Pacific carriage was in its infancy. Since 1945 the progress of international air carriage throughout the world has been intensified both in the technical field and in volume; and on the whole international legislation on the subject has kept pace with this progress.

(As an outcome of the Treaty of Versailles, the Paris Convention¹ dealt with most aspects of public international air law, which consequently was incorporated in the national laws of those States which ratified or adhered to the Convention.) It defined the limits and rights of States over their air space and established international rights of airways; and laid down rules, and regulations for the observance of such rules, concerning nationality and registration of aircraft, standards of fitness to fly and competency of personnel, and concerning flight, navigation and landing. The Convention contained Annexes dealing with (a) Classification of aircraft and definitions, marking of aircraft and registration of aircraft call signs; (b) Certificates of Airworthiness; (c) Log Books, including journey, aircraft, engine and signal logs; (d) Lights and signals, ground markings and air traffic rules; (e) Operating personnel and their licences and Certificates of competency; (f) Aeronautical maps and ground signs; (g) Meteorological matters; and (h) Customs.

Furthermore, Article 34 of the Convention constituted the International Commission for Air Navigation (I.C.A.N.) for the purpose of performing duties under the Convention, for reviewing and recommending proposals for revision of the Convention, for amending from time to time any of the Annexes, except the one relating to Customs, and for disseminating information to Contracting States. The I.C.A.N. was composed of representatives

¹ The Convention relating to the Regulation of Aerial Navigation, dated Paris, October 13, 1919, came into force on July 11, 1922. It was modified from time to time and corrected up to January, 1944, when it reached its final form. At that time thirty-two States were High Contracting Parties, including all their colonial territories. A somewhat similar Convention, the Havana (Pan American) Convention of 1928, governed the public international air law of those States, including the U.S.A., in the continent of America which were parties to the Convention.

of all the States which were parties to the Paris Convention and met annually; and, through its machinery, kept the Convention and its Annexes up to date, in step with the technical progress which was being rapidly achieved. The legislative power vested in the I.C.A.N. was the main, if not the sole, reason why the United States were unable to ratify the Convention, to which most States in the Eastern hemisphere, and the Argentine Republic and Canada in the Western hemisphere, became parties, because under the United States Constitution such a Convention is a self-executory treaty when approved by the President and two-thirds of the Senate; and it was not constitutionally possible to delegate legislative authority such as the Convention reposed in the I.C.A.N.

When the Chicago Convention of 1944,² which included subjects similar to those of the Paris Convention, superseded the latter, and the Havana (Pan American) Convention of 1928, and was eventually ratified or adhered to by about fifty-seven States, including the U.S.A., this difficulty was obviated.

The Convention did not constitute any body analogous to the I.C.A.N., but the International Civil Aviation Organisation (I.C.A.O.) created by the new Convention was given power to deal with international standards and recommended practices. Similarly, in the sphere of private international air law, the functions formerly exercised by the Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.)³ were, in 1948, taken over by the Legal Committee of the I.C.A.O., which was specially constituted for the purpose and which consisted mainly of the former members of the C.I.T.E.J.A.

< The Assembly of the I.C.A.O. is empowered (*inter alia*) to consider proposals for modification or amendment of the provisions of the Convention and, if it approves of these proposals, to recommend them to the Contracting States. The Council has power (*inter alia*) to adopt international standards and recommended practices concerning technical matters specified in Article 37⁴ and

² Convention on International Civil Aviation, which was opened for signature on December 7, 1944, in Chicago, and ratified by the requisite minimum number of States (twenty-six) on March 4, 1947.

³ The C.I.T.E.J.A. was constituted in 1925 by a large number of States, some of which were not parties to the Paris Convention. It was a permanent Drafting Committee, the members of which were specialists in air law appointed by governments. Its main work was the drafting of international air legislation proposed. Its Four Commissions drafted a number of Conventions, five of which were adopted and signed.

⁴ These comprise (a) communications systems and air navigation aids, including ground markings; (b) characteristics of airports and landing areas; (c) rules of the air and air traffic practices; (d) licensing of operating and mechanical personnel; (e) airworthiness of aircraft; (f) registration and identification of aircraft; (g) collection and exchange of meteorological information; (h) log

to notify Contracting States accordingly; and to consider recommendations of the Air Navigation Commission for amendment of Annexes to the Convention.⁵

From the very short resumé above it will be observed that most of the public international air law of the world to which air carriers are subject is codified in the Chicago Convention and administered through the I.C.A.O., and, of course, through the national laws of those States which are parties to the Convention, comprising practically the whole world except the U.S.S.R. In addition, there is the International Sanitary Convention for Aerial Navigation of April 12, 1933, to which twenty-five States, with their Colonies, are parties,⁶ and the Convention concerning Precautionary Arrest of May 29, 1933, to which eleven States are parties.⁷ The Salvage of Aircraft at Sea Convention of 1938 and the Air Fuel Tax Convention of 1939 have not yet been ratified. Nevertheless, there is a mass of international regulation which must be observed by carriers, quite apart from any national laws and regulations which may be applicable in different territories traversed on international journeys.

Turning to private international air law, there have to be considered the Convention of Warsaw in 1929⁸ dealing with the

books; (i) aeronautical maps and charts; (j) customs and immigration procedure; (k) aircraft in distress and investigation of accidents; 'and such other matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate'.

⁵ The Annexes consist of forms of an 'International Air Services Transit Agreement' and an 'International Air Transport Agreement', otherwise known as the 'Five Freedoms' Agreement, which has given rise to extremely difficult problems—so much so that the privileges comprised in the 'Five Freedoms' are normally made the subject of special bilateral agreements between States concerned to deal with each specific case.

⁶ The parties to this Convention include Australia, Belgium and Colonies, Egypt, Germany, Great Britain and Northern Ireland and the British Colonial Empire, Greece, Italy and Colonies, Lebanon, Morocco, Monaco, Netherlands, Poland, Rumania, Sweden, Syria, Tunis, Union of South Africa, U.S.A., Bolivia, Brazil, Chile, Iraq, Liberia, Sudan and Turkey. It deals with aerodromes and their staffs, aircraft sanitary documents, merchandise and mails, general regulations and regulations applicable to special diseases (plague, cholera, typhus, smallpox), measures on departure and arrival, and general and special regulations concerning yellow fever.

⁷ The parties to this include Belgium, Brazil, Denmark, Germany, Guatemala, Italy, Netherlands, Norway, Poland, Rumania, Spain, Spanish Morocco, Sweden.

⁸ Convention for the Unification of certain Rules relating to International Carriage by Air signed at Warsaw on October 12, 1929. About thirty States, and their Colonies, have ratified or adhered to this, including the whole of the British Commonwealth and Empire (except the Union of South Africa), the U.S.A. and most other States interested in air transport. It is not possible to say exactly the number of States which are at present High Contracting Parties to the Convention because the position of some States which have recently changed their status or acquired independent sovereignty is obscure in relation to the provisions in the Convention dealing with ratification or adherence, and especially, from the British point of view, in relation to Orders in Council made under section 1 (2) of the Carriage by Air Act, 1932, in which provision is made for

liability of the carrier towards passengers and owners of cargo, the Rome Convention of 1933⁹ and the Brussels Protocol thereto of 1938, dealing with the liability of aircraft operators towards third parties on the surface, and the Convention on the International Recognition of Rights in Aircraft of 1948.¹⁰

In all territories of Contracting States¹¹ the Warsaw Convention rules¹² are applicable to all 'international carriage', which is defined by the Convention as meaning¹³ 'any carriage in which, according to the Contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention'. This definition has given rise to much argument, but it has been decided that a Contract of Carriage from a Contracting State to a non-Contracting State and back to the original Contracting State, under the provisions of a return ticket, is 'international carriage' governed by the Convention.¹⁴ Thus in such a case passengers travelling on single tickets from the Contracting State would not be subject to the Convention, but travellers with return tickets would be. Travellers from a non-Contracting State to a Contracting State, whether with single or return tickets, would not be subject to the Convention. The draftsmen of the Convention may not have realised that a territory may be subject to the sovereignty of one

His Majesty in Council to certify from time to time who are the High Contracting Parties to the Convention, under which provision various certifying Orders have been made from time to time, the main Order being the Carriage by Air (Parties to Convention) Order of 1939 (S.R. & O., 1939, No. 733), since when Portugal, Nigeria and Canada have been certified as High Contracting Parties.

⁹ International Convention for the Unification of certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface signed at Rome on May 29, 1933. Only Belgium, Brazil, Guatemala, Rumania and Spain have ratified this.

¹⁰ This Convention was signed at Geneva on June 19, 1948. It comes into force ninety days after two of the Signatory States have deposited their Instruments of Ratification. So far, only the U.S.A. has deposited its Instrument of Ratification. See 2 I.L.Q. 421 for illuminating article on this Convention by Brigadier R. O. Wilberforce, O.B.E.

¹¹ In the Warsaw Convention designated 'High Contracting Parties', which has created difficulty because it is used with different significations in different parts of the Convention, i.e., as meaning either States which have merely signed without ratifying, or States which have ratified or adhered.

¹² An English translation of the original French, in which alone the Convention is drawn up, is scheduled to the Carriage by Air Act, 1932.

¹³ Convention, Article 1 (2).

¹⁴ *Grein v. Imperial Airways, Ltd.* [1937] 1 K.B. 50, etc., and U.S.Av.R. 211, C.A.; and *Wyman v. Pan American Airways* (1942) U.S.Av.R. 89 and (1943) U.S.Av.R. 1.

State and to the authority of another—*e.g.*, bases in the Western Atlantic leased by the British Government to the U.S.A. The Convention is silent on the subject of Trusteeships. In more recent Conventions the expression used is 'territories for the foreign relations of which a Contracting State is responsible'; and the expression 'High Contracting Parties' is not used.

Since carriage operated by international carriers may not be 'international carriage' governed by the Convention, even though it passes beyond the frontiers of a State, it is necessary for carriers to safeguard their position in relation to such carriage by means of conditions contained in or referred to in Traffic Documents. This is specially important where English or Scottish law is applicable to the carriage because, in death claims under such laws, the carriers may be liable for damages to an unlimited amount if they were under any liability at all towards the deceased passenger, *i.e.*, liability may be repudiated altogether, but may not be limited.¹⁵

Chapter II of the Convention, comprising Articles 3 to 16, deals mainly with Traffic Documents (passenger tickets, baggage checks and consignment notes for goods) in considerable detail. Some of the provisions of these Articles are very obscure and the provisions generally have created substantial practical difficulties and dangers for air carriers and their insurers. Incidentally the provisions concerning stoppage *in transitu* raise grave obstacles to making the consignment note negotiable, in a manner similar to that applicable to a maritime bill of lading.

Arising from proposals to amend the Convention, which were first instigated by the International Air Traffic Association about fourteen years ago, and which have been under discussion ever since, the writer, as reporter on the subject to the Legal Committee of the I.C.A.O., has suggested that the whole of Chapter II should be omitted from the new Convention which it is hoped will eventually be substituted for the existing one, leaving merely a simple Article providing that in the event of any dispute concerning the terms of any contract of carriage the burden of proving those terms shall rest with the party seeking to enforce it. Such terms would naturally include information indicating whether or not the carriage concerned was 'international carriage' under the Convention.

Chapter III deals with the liability of the carrier. This also

¹⁵ This is the effect of the Fatal Accidents Act (Lord Campbell's Act), 1845, and *Nunan v. Southern Ry.* [1923] 2 K.B. 703 and [1924] 1 K.B. 223. It has resulted in carriers liable to be subject to English law, in connection with non-Convention carriage, incorporating in their passenger tickets a special disclaimer of all liability. See also *Ludditt v. Ginger Coote Airways* [1947] A.C. 233 and (1942) U.S.Av.R. 178, which was decided in favour of the carrier on appeal to the Judicial Committee of the Privy Council.

raises some difficult legal problems. For instance, Article 17 provides that 'the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking'.

Some questions which arise are whether this covers mental injury; also when does the operation of embarking begin and when does the operation of disembarking end; also what is the position of an individual who is thrown from an aircraft in a heavy landing without sustaining injury and is then burned by an explosion of fuel. It seems clear that the case of passengers who suffer damage when seeking to reach a place of safety following the descent of an aircraft in the sea or a desert region is not covered by the Convention.

The sphere of application of the Convention in the case of cargo or registered baggage 'comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever' (Article 18); but paragraph 3 of this Article goes on to provide that 'the period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air'. These provisions have raised numerous doubts and difficulties, and so has the succeeding Article (19) which provides that 'the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods'. It is difficult to understand how a claim for delay could arise if no specified time is stipulated in the contract of carriage. Time-tables of carriers might have a bearing upon this subject; but they are usually wise enough to provide that such time-tables are not to be considered as part of the contract of carriage and are intended to indicate only estimated times of transit. The question concerning delay in starting is left open.

Article 20 provides that 'the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures'; and that 'in the carriage of goods and luggage, the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in

navigation, and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage'.

In the first place it is obvious that if 'all necessary measures' to avoid the damage were taken, no damage could have occurred. Clearly what was intended was that the carrier should be absolved from liability if he proves that he had taken all proper or reasonable measures which could be expected from a good and careful air carrier. The second portion of the Article absolving the carrier from liability in the carriage of baggage and goods is curious. If its provisions are invoked for the purpose of avoiding liability for loss of, or damage to, goods and luggage, then obviously it would involve an admission of liability so far as passengers are concerned. Therefore, for this and other reasons it has been suggested that the second portion of this Article should be omitted from any new Convention.

Article 22 deals with the limits of liability, namely, 125,000 francs in the case of a passenger, 250 francs per kilogram in the case of cargo and registered baggage, and 5,000 francs per passenger in the case of hand baggage. The francs concerned are gold or Poincaré francs. At the date of the Convention 125 of these francs were equivalent to £1. The limit of passenger liability was therefore £1,000. When sterling ceased to be tied to gold the sterling equivalent of Poincaré francs necessarily varied from time to time. Prior to September, 1949, the sterling equivalent of 125,000 Poincaré francs was a trifle over £2,000, and following recent devaluation of sterling, the equivalent of 125,000 Poincaré francs has risen to £2,937 6s. 3d. and the equivalent of 250 of such francs to £5 16s. 1d., as compared with £4 0s. 6d. prior to devaluation. The dollar equivalent of 125,000 Poincaré francs is approximately \$8,300. Devaluation has consequently involved carriers concerned in having to increase substantially their insurances of risks of liability under the Convention.

Article 25 provides that 'the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct; similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment'. These provisions cause great anxiety to carriers and their insurers, especially since the French word 'dol' (translated in English as 'wilful misconduct') is interpreted in certain

legal systems as meaning wilful misconduct or gross negligence, besides which there have recently been cases decided in the United States which indicate that courts there may be inclined to find that wilful misconduct exists under circumstances which the courts of some other countries might decide involved negligence only.) This question, therefore, is being studied with great care by the members of the Legal Committee of the I.C.A.O. In the first place it is necessary to define exactly what is intended by the expression 'wilful misconduct'. So far as English law is concerned, the cases of *Re City Equitable Fire Insurance Co., Ltd.* [1925] 1 Ch. 407; *Forder v. Great Western Ry.* [1905] 2 K.B. 532; and *Lewis v. Great Western Ry.* (1877) 3 Q.B.D. 195 have a material bearing; also the recent American cases of *Ritts v. American Overseas Airlines*,¹⁶ and *Ulen v. American Airlines Inc.*¹⁷

In the second place, consideration has to be given to the extent to which carriers should be made liable for the wilful misconduct of their servants or agents. There are three main schools of thought concerning these questions; one takes the view that it is shocking that the carrier should be protected in any way by limited liability if wilful misconduct by the carrier or his servants or agents was the cause of the damage.) Another school of thought considers that the carrier should have the benefit of the limitation of liability provided by Article 22 of the Convention unless he personally was guilty of wilful misconduct, on the ground that it is not fair that he should be made liable for the wilful act or default of servants over whom, especially in the case of a company, he may have little effective control so far as concerns operational questions. This school considers that in any event the wilful misconduct of members of the operating personnel of an aircraft, or of the

¹⁶ Decided in the United States District Court of the Southern District of New York—Civil No. 40—730. In this case, a death claim falling under the Warsaw Convention, it was put to the jury: (a) was there wilful misconduct, and, if so, what should be the damages; and (b) if the answer to (a) is in the negative, did the carrier take all necessary and reasonable measures to avoid the damage, or was it impossible for him to take such measures.

The judge instructed the jury that if the answer to (a) was in the negative and the answer to (b) was in the affirmative, there must be judgment for the defendant carrier; but if the answer to (b) was in the negative, the plaintiffs would be entitled to judgment for \$8,300. Rather surprisingly the jury answered 'yes' to the second question, having answered 'no' to the first, and judgment was given for the defendant, although the report might lead some lawyers to consider that the carrier had failed to prove that all necessary measures to avoid the damage had been taken. In the recent American case of *Ulen v. American Air Lines Inc.* both the Court of First Instance and the Court of Appeal held that wilful misconduct existed under circumstances which might, in the courts of some other countries, have been held to constitute no more than negligence.

¹⁷ United States Court of Appeals, District of Columbia Circuit—September 26, 1949.

ground staff concerned therewith, should not involve the carrier himself in unlimited liability. A third school considers that in cases of wilful misconduct by the carrier, his servants or agents, the liability should be substantially greater than as provided in Article 22 of the Convention, but that it should be limited to two or three times the maximum applicable when no wilful misconduct exists.

Article 28 of the Convention provides for alternative courts in which actions may be brought at the option of the plaintiff; and Article 29 limits the period for taking action to two years.

It is not practicable within the scope of notes of this character to deal in greater detail with the remaining provisions of the Convention, a number of which raise highly technical questions. It should be noted, however, that the Convention makes no provision for charters of aircraft with crew, which raise important questions which require solution, especially according to whether the operator is in the position of carrier, or whether he is merely an agent for the charterer who, as carrier, sub-contracts space in the chartered aircraft. It has also been suggested that in any new Convention there should be inserted provision for negotiability of the consignment note, both concerning the consignor's and the consignee's copy, on terms similar to those applicable to a Bill of Lading in maritime practice.

The Rome Convention of 1933⁹ requires little comment because, although ratified by five States, it is practically a dead letter. It provides that damage caused by an aircraft in flight to persons or property on the surface gives a right to compensation on proof only that the damage exists and that it is attributable to the aircraft. The liability falls upon the 'operator' of the aircraft, who is defined as meaning any person who has the aircraft at his disposal and who makes use thereof for his own account. In the case of damage on the surface caused by two or more aircraft in collision, the operators concerned are jointly and severally liable to third parties. The liability is limited to a sum corresponding with 250 Poincaré francs for each kilogram of the weight of the aircraft, provided that the limit of the operator's liability shall not be less than 600,000 francs nor greater than 2,000,000 francs; and one-third of the maximum liability is appropriated to compensation for damage caused to property and the other two-thirds to compensation for damage caused to persons, provided that in the latter case the compensation payable shall not exceed 200,000 francs in respect of each person injured; and if several persons have suffered damage in the same occurrence and if the total sum payable by

way of compensation exceeds the above-mentioned limit, the compensation due to each of such persons is reduced proportionately so that the total does not exceed the aforesaid limits. The Convention provides for every aircraft registered in the territory of a Contracting State to be insured up to the limits of the Convention in respect of third party damage with an authorised insurer; but for such insurance there may be substituted a cash deposit or bank guarantee. However, the operator is not entitled to avail himself of the limiting provisions of the Convention if the damage results from the gross negligence or wilful misconduct of the operator or his servants or agents, except that where the operator proves that the damage resulted from negligence in pilotage, handling or navigation of the aircraft or, where his servants or agents are concerned, that he has taken all proper measures to prevent the damage, he shall be entitled to the benefit of the provisions of the Convention limiting liability. The limiting provisions are not applicable if the operator has failed to effect the insurance, cash deposit or bank guarantee above referred to.

The principles of the Rome Convention are incorporated in Part III of the Air Navigation Act, 1936,¹⁸ although the limits of liability set out in the Second Schedule to the Act do not correspond exactly with those in the Convention. However, Part III of the Act has never been brought into operation by an Order as required by section 22, since the Convention has not been ratified by the United Kingdom or by any British Commonwealth or Empire territory. Consequently its provisions are not applicable in any such territory. The Rome Convention, even with the Brussels Protocol of 1938 thereto, has always been considered unsatisfactory, and it is now being considered with a view to revision by the Legal Committee of the I.C.A.O. The intention is to include in any revised convention provisions concerning third party damage arising from aerial collision. At present the liability of air carriers towards third parties on the surface is governed by the law of the territory where the damage is sustained, except in the five States which have ratified the Rome Convention. There have not been many third party claims of this character and none has been of serious magnitude; but there is always the risk of a catastrophic disaster arising from explosion and fire, and it is not possible to effect insurance against unlimited liability. Therefore it is of importance to carriers that some limitation of their potential liability should be made the subject of international agreement.

¹⁸ Now superseded by Part IV of the Civil Aviation Act, 1949, which part has not yet been brought into force.

[The Convention on the International Recognition of Rights in Aircraft of 1948¹⁰ provides for the international recognition, as between Contracting States, of (a) rights of property in aircraft; (b) rights to acquire aircraft by purchase coupled with possession of the aircraft; (c) rights to possession of aircraft under leases of six months or more; and (d) mortgages, hypothèques and similar rights in aircraft which are contractually created as security for payment of an indebtedness, provided that such rights (a) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of constitution, and (b) regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality. The Convention includes provisions concerning recordings, priorities, attachments, sales and preferential claims. [It provides that recordings under the Convention may be effected not only in connection with the aircraft itself but also in respect of spare parts stored in a specified place or places. The object of the Convention is to protect the interests of parties who have charges on or other interests in aircraft and spare parts in consideration of loans made thereon. From the point of view of parties who lend large sums to constructors and operators of aircraft in order to finance purchases, it is of the utmost importance that the securities created should have international validity wheresoever the aircraft and spare parts concerned may happen to be from time to time.]

As above mentioned, this Convention has not yet been ratified by the minimum of two States required by Article 20, and it is therefore not yet operative in any State.

The above notes refer shortly to some of the large number of regulations and provisions of a legal character which affect international air carriers. From what has been said it will be observed that in a number of respects a large measure of international uniformity has been achieved, but that there still remains much to be done before the legal position of international air carriers can be regarded as settled on a satisfactory basis, either concerning public or private international law, throughout the world, or even the greater part thereof.

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JURISDICTION, UNITY OF DOMICILE AND CHOICE OF LAW UNDER THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1949

THE Law Reform (Miscellaneous Provisions) Act, 1949,¹ s. 1, makes changes in the English conflict of laws with possible consequences that may not have been envisaged by the draftsmen of the Bill. In 1947 the Committee on Procedure in Matrimonial Causes reported that the provisions of the Matrimonial Causes Act, 1937, and of the Matrimonial Causes (War Marriages) Act, 1944, did not go far enough to meet the case of a deserted wife whose husband was domiciled abroad.² In the sense that cause must precede effect the Committee's recommendations³ led chronologically (but in scarcely any other sense) to the passing of section 1 of the Act of 1949.⁴ The following comment is confined to the first section of the Act and matter relevant to it. The problems with which it deals may be considered under five heads :

¹ 12, 13 & 14 Geo. 6, c. 100. This became law on December 16, 1949.

² Final Report, Cmd. 7024, p. 80.

³ *Id.*, pp. 30-31, based largely on Professor Cheshire's suggestions in 61 L.Q.R. 352 ff.

⁴ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1, runs as follows:—

1.—(1) The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if—

(a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and

(b) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

(2) Without prejudice to any jurisdiction exercisable by the court apart from this section, the foregoing provisions of this section shall apply to proceedings for nullity of marriage as they apply to proceedings for divorce.

(3) In proceedings under sub-section (1) of section eight of the Matrimonial Causes Act, 1937 (which enables the court to make a decree of presumption of death and dissolution of marriage) the court shall have jurisdiction in the following cases only, that is to say—

(a) in any proceedings, if the petitioner is domiciled in England;

(b) in proceedings by the wife, if she is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings;

and in determining for the purposes of this subsection whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.

(4) In any proceedings in which the court has jurisdiction by virtue of this section, of section thirteen of the Matrimonial Causes Act, 1937, or of section one of the Matrimonial Causes (War Marriages) Act, 1944, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.

1. Residence as a basis of jurisdiction in divorce and nullity of marriage.
2. Recognition abroad of English decrees under the Act.
3. Sex discrimination in divorce and nullity jurisdiction.
4. The principle of unity of domicile of husband and wife.
5. Choice of law in divorce and nullity.

1. RESIDENCE AS A BASIS OF JURISDICTION IN DIVORCE AND NULLITY OF MARRIAGE

In a familiar passage from the opinion of the Judicial Committee of the Privy Council in *Le Mesurier v. Le Mesurier*⁵ the English principle of divorce jurisdiction was stated in these words: '... according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage'.⁶ This principle on this authority has been generally followed by the courts and is now universally accepted by English writers on the conflict of laws.⁷ The unquestioning acceptance by English courts of a Privy Council decision on appeal from a former colony subject to the Roman-Dutch system of law offers scope for comment which is beside the point of the present article. It is sufficient to note the uneasiness which English courts have felt since the date of this decision in their efforts to administer both law and justice,⁸ a feeling which eventually moved the heart of Parliament itself and resulted in the passing of relevant sections of the Acts of 1937,⁹ 1944¹⁰ and 1949.¹¹ So long as *Le Mesurier v. Le Mesurier* could be applied consistently with the existence of a wife's capacity to acquire, under appropriate circumstances, a domicile of choice independent of that of her husband,¹² no great hardship arose in countries of the British Commonwealth in respect of divorce jurisdiction; but the Judicial Committee in 1926, in maintaining the principle of perpetual unity of domicile of husband and wife,¹³ called a halt

⁵ [1895] A.C. 517; 64 L.J.P.C. 97.

⁶ 64 L.J.P.C. 97, 107.

⁷ Dicey's *Conflict of Laws* (6th ed.), Rule 31; Cheshire, *Private International Law* (3rd ed.) 471; Wolff, *Private International Law*, s. 71; Schmitthoff, *English Conflict of Laws* (2nd ed.) 314; Read, *Recognition and Enforcement of Foreign Judgments*, 200-201; Falconbridge, *Essays on the Conflict of Laws*, 611; Graveson, *Conflict of Laws*, 310.

⁸ *Bater v. Bater* [1906] P. 209; *Stathatos v. Stathatos* [1913] P. 46; *De Montaignu v. Montaignu* [1913] P. 154.

⁹ Matrimonial Causes Act, 1937, s. 13.

¹⁰ Matrimonial Causes (War Marriages) Act, 1944, s. 1.

¹¹ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1.

¹² As in *Stathatos v. Stathatos* and *De Montaignu v. De Montaignu* (above).

¹³ *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444.

to the legal emancipation of the married woman and made necessary legislative intervention to remedy the judicial inability to advance the law of matrimonial jurisdiction.¹⁴ In Professor Read's words, 'When the judicial process fails, . . . the legislative may be expected to attempt to abrogate a rule that does violence to the social conscience'.¹⁵ The statutory attempts throughout the Empire¹⁶ which have been directed towards a residence basis of divorce jurisdiction show a remarkable similarity in purpose to the English statutes. The Canadian Divorce Jurisdiction Act of 1930, s. 2, allows a deserted wife to petition after two years' residence, provided she was domiciled in the same Province at the time of desertion. Read considers analogous provisions of New Zealand and of the Australian States as basing jurisdiction on the deserted wife's separate domicile.¹⁷ It is thought that those statutory provisions go no further than establishing a residence basis of matrimonial jurisdiction in favour of the deserted wife. None of them confers on her capacity to acquire a separate domicile. In all of them the issue of principle is evaded by resort to legal fiction: the deserted wife '*shall be deemed to have retained her (Queensland) domicile notwithstanding that her husband may have since the desertion acquired any foreign domicile*'.¹⁸ Many of them only give her this 'as if' domicile for the specific purpose of the statute, not generally.¹⁹ Her status in this respect is utterly different from that of the American married woman who is, with regard to the acquisition of a separate domicile, almost in the same position as a married man.²⁰ The attempt to achieve the same result either on a basis of residence or of a fictitious and limited kind of domicile, while adequate within the municipal system of the court exercising matrimonial jurisdiction on such basis, cannot expect to receive full faith and credit in the sphere of private international law, even by analogy with the rules of the forum of the countries mentioned relating to the recognition of foreign judgments.

The Law Reform Act, 1949, s. 1 (1) and (3) prescribes for

¹⁴ New Zealand Divorce and Matrimonial Causes Act, 1928; Canadian Divorce Jurisdiction Act, 1930.

¹⁵ *Op. cit.*, 230; see also, Falconbridge, *op. cit.*, 613-4.

¹⁶ Most of these are collected and discussed by Read, *op. cit.*, 218-231; see also Cheshire, *op. cit.*, 475.

¹⁷ *Op. cit.*, pp. 223 ff.

¹⁸ Matrimonial Causes Acts Amendment Act, 1923 (Queensland), cited by Read, *op. cit.*, 224. This is typical of the statutory provisions mentioned.

¹⁹ Victoria (Marriage Act, 1928, s. 75); Tasmania (Act No. 65 of 1919); New Zealand (Divorce and Matrimonial Causes Act, 1928, s. 12 (2)); South Australia (Matrimonial Causes Act, 1867 to 1928, s. 43); Western Australia (Divorce Amendment Act, 1911, as amended).

²⁰ Beale, *Conflict of Laws*, I, 199-208; Restatement, *Conflict of Laws*, ss. 27, 28.

the exercise of jurisdiction on a wife's petition a period of three years' ordinary residence 'immediately preceding the commencement of proceedings'. The purpose of Parliament in fixing a definite period of residence of such duration is a little obscure. If the object of the provision is to give relief to a deserted wife, one may wonder why she must wait for three years before obtaining it. If, as seems a likely additional reason, it was considered that a lengthy residence qualification would more nearly approximate to the normal jurisdictional basis of domicile, one can only deplore the renewed attempt to evade the issue of giving to the wife the power to acquire her own domicile, a test which would be far more realistic in giving effect to the individual case, in which domicile may have been acquired in much less or much longer time than three years. If, on the other hand, the three year period is no more than a formal requirement of ordinary residence, any other period would presumably have served the same purpose, and one may well wonder how, under such circumstances, a decree under this Act can reasonably expect to receive greater international recognition than the notorious decrees of one or two American States based on a few weeks' 'domicile' in the particular State.

Underlying English statutory exceptions to the domiciliary basis of divorce jurisdiction is a confusion of thought, or possibly even an absence of thought, on the theory of divorce. While the normal jurisdiction is based on the status theory, and accordingly is dependent exclusively on domicile, the statutory exceptions appear to partake of the penal theory of divorce, the concept of punishment for a matrimonial offence, and allow the aggrieved wife to petition on one of the normal bases of criminal jurisdiction, namely, residence.²¹ This penal theory has no place in modern English law.²² A residence basis of jurisdiction is incompatible with and inappropriate to the status theory of divorce. For many reasons, of which the above is the most academic and least significant, domicile should be the one and only basis on which domestic status can be judicially changed. But until the wife is allowed openly and legally to acquire a separate domicile, we must welcome the compromise of divorce jurisdiction founded on residence as a practical means of doing justice in cases of hardship, even though a decree pronounced on this basis may have no more than territorial effect.

Subsection (2) of section 1 of the Act raises a less acute problem in applying to nullity of marriage the provisions considered above, but without prejudice to any existing jurisdiction. A

²¹ Incongruously, however, and for obvious reasons, the residence is that of the injured party, not of the 'wrongdoer'.

²² Dicey, *op. cit.*, 217-219.

petitioning wife who has the necessary residence qualification and whose husband is domiciled outside the United Kingdom, Channel Islands and the Isle of Man may accordingly obtain relief in the English courts. What is as notable as this extension of nullity jurisdiction is the absence of any distinction for the purpose between void and voidable marriages. Because a declaration of a void marriage does not affect status, and in fact is legally unnecessary,²³ it would be difficult to resist any basis of jurisdiction; one can only question the need for so long a residence as three years. But voidable marriages fall much closer to the general category of valid marriages. A question of judicial change of status is involved, and for reasons stated above in relation to divorce, jurisdiction should be based on domicile alone²⁴—but a domicile which the wife is free to acquire for herself under the circumstances envisaged by the Act.

2. RECOGNITION ABROAD OF ENGLISH DECREES UNDER THE ACT

The most important problem raised by section 1 of the new Act so far as concerns the conflict of laws relates to the extent of recognition abroad of decrees made by the English courts by virtue of the residence jurisdiction which the Act confers. The domiciliary basis of jurisdiction in divorce has its corollary in the principle of common law conflict of laws that only a decree pronounced by the court of the parties' (or party's) domicile is entitled to recognition by the courts of any other country.²⁵ Nothing short of domicile will suffice.²⁶ In no country is this principle of recognition more rigidly enforced than in England, for domicile in any country means for an English judge domicile in the strict English sense.²⁷ Falconbridge has well said that the cases in which a court exercises jurisdiction should correspond with those in which it recognises the jurisdiction of foreign courts,²⁸ but it is a commonplace that such an attitude rarely, if ever, exists in fact. We are faced with the somewhat Gilbertian situation in which those common law countries which still deny to the wife an

²³ *De Reneville v. De Reneville* [1948] 1 All E.R. 56.

²⁴ See Fleming, 3 I.L.Q. 241-2.

²⁵ *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Harvey v. Farnie* (1882) 8 App.Cas. 43; *Green v. Green* [1893] P. 89; *Earl Russell's Trial* [1901] A.C. 446; *Le Mesurier v. Le Mesurier* [1895] A.C. 517; *Bater v. Bater* [1906] P. 209; *Lanckester v. Lanckester* [1925] P. 114.

²⁶ Dicey, *op. cit.*, Rule 72; Read, *op. cit.*, 220, 221; Cheshire, *op. cit.*, 479; Wolff, *op. cit.*, p. 263; Schmitthoff, *op. cit.*, 315; Morris, 'Recognition of Divorces granted outside the Domicile', XXIV Canadian Bar Rev. 73 (1946).

²⁷ *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692; and cases cited above, note 25.

²⁸ *Op. cit.*, 629.

independent domicile recognise each other's decrees when based on domicile, but refuse recognition to decrees which are based on statutory exceptions to such domiciliary jurisdiction despite the fact that the nature and purpose of those exceptions are (speaking broadly) common to them all. This illogical attitude betrays at the same time a rigid adherence to the status theory in recognition of foreign divorce decrees and its partial abandonment in matters of a court's own jurisdiction.²⁹ A further possible explanation of this dualistic attitude may be found in the confusing British doctrine of identifying the marriage status with the domicile of one only of the two parties to a marriage, namely, the husband.

It is reasonably clear according to present English law that our courts would refuse to recognise foreign decrees of divorce based on a residence jurisdiction.³⁰ In so far as 'The recognition of foreign judgments, like the application of foreign law, is based on justice'³¹ this refusal would appear to fall far short of the ideal. That both English and foreign judges have at times been conscious of this falling-short of justice is obvious from the liberties employed with the decision in *Armitage v. Att.-Gen.*,³² by which the courts of country A recognise the decree of country B if such is recognised by the courts of country C, the domicile of the parties, as an effective dissolution of their marriage.³³ But at the best this is an unsatisfactory and circuitous way of doing justice in the face of a principle which, so far as the wife is concerned, is unrealistic. Within a federation, quite apart from such provisions as the Full Faith and Credit Clause of the U.S. Constitution, the growth of inter-state or inter-provincial conflict of laws normally sets the pattern for rules of private international law in its wider sense. One would expect to find as evidence of this inter-state comity a more liberal degree of recognition of the judgments of sister members of the federation. So far as divorce decrees are concerned, however, this appears not to have taken place in Canada, though it is possible that a developing tendency in this direction was prematurely doomed by the Privy Council's decision in *Att.-Gen. for Alberta v. Cook*.³⁴ The result is that even today

²⁹ It is one of the incongruities of comparative law that in parts of the United States (where a wife may acquire her own domicile), domiciliary jurisdiction is exercised by courts which maintain the contractual theory of divorce.

³⁰ Dicey, *op. cit.*, 375; Read, *op. cit.*, 219-221; Tuck, XXIII Canadian Bar Rev. 245; Falconbridge *op. cit.*, 617, but expresses hopeful doubts—cf. 629. Wickens in XXIII Canadian Bar Rev. 244 considers that recognition would be granted to such decrees.

³¹ Wolff, *op. cit.*, p. 254.

³² [1906] P. 135, followed in *Clark v. Clark* (1921) 37 T.L.R. 815.

³³ See Read, *op. cit.*, 216 ff; Falconbridge, *op. cit.*, 617; Morris, *op. cit.*, 75 ff.

³⁴ [1926] A.C. 444.

inter-provincial recognition of divorce decrees based on residence jurisdiction is only possible by virtue of the Canadian Divorce Jurisdiction Act, 1930.³⁵ Such being the case, little prospect exists at present of English 'residence' decrees being recognised in the Canadian Provinces or in the Australian States, since, ironically enough, the latter follow closely English decisions.³⁶ Judicial distrust of legislation can be carried to irrational extremes.

Four remedies for this evil have been proposed. The Committee on Procedure in Matrimonial Causes recommended³⁷ that 'The validity of any decree made in any part of His Majesty's Dominions or other prescribed country under a law substantially corresponding to the foregoing provisions³⁸ should be recognised in our courts'. Professor Read³⁹ recommends resort to 'treaties' among members of the Commonwealth, requiring reciprocal internal legislation to ensure recognition of divorce decrees granted on the non-domiciliary jurisdictional bases which he has discussed. Alternatively, such statutes as the Foreign Judgments (Reciprocal Enforcement) Act, 1933, could be amended 'to provide for recognition of decrees founded upon the various divorce jurisdiction Acts'.⁴⁰ In a similar sense to Read's first proposal, Dean Falconbridge has suggested reciprocal legislation among units of the British Empire.⁴¹ The Matrimonial Causes (War Marriages) Act, 1944, s. 4, would presumably rank as an instance of English legislation of this type.⁴² Finally, Professor Tuck has advocated the setting up of a committee of legal representatives of the Commonwealth countries to formulate rules for adoption in matters of divorce jurisdiction and the recognition of decrees.⁴³

The fate of the first of these proposals is already obvious from the absence of any corresponding provision in the Law Reform Act, 1949. The other suggestions all suffer from the same major defects: they are legislating for an exception and confining their

³⁵ Falconbridge, *op. cit.*, 616; Read, *op. cit.*, 218.

³⁶ Fleming, 3 I.L.Q. 27; cf. Parsons, 'English Precedents in Australian Courts', 1 Annual Law Rev. 211 ff. (1949).

³⁷ Final Report, 31 (Cmd. 7024).

³⁸ *Id.*, 30, 31: '(i) When a wife has been deserted by her husband and she was immediately before the marriage or immediately before the desertion, domiciled in this country, the High Court should have jurisdiction in and in relation to proceedings for divorce as if both parties were at the material times domiciled here'.

³⁹ *Op. cit.*, 230, 231.

⁴⁰ *Id.*, 231.

⁴¹ *Op. cit.*, 621.

⁴² It is interesting to note that the Law Reform (Miscellaneous Provisions) Act, 1949, contains no similar provision acknowledging the international limits of recognition of divorce decrees based on residence.

⁴³ XXII Canadian Bar Rev. 681, 692; XXIII Canadian Bar Rev. 246.

proposals to countries of the British Commonwealth. This helps neither the English petitioning wife under section 1 of the Act of 1949 nor the Canadian wife under section 2 of the Canadian Act of 1930, if in either event she wishes to remarry and settle in the United States. The unification of law of marriage and divorce throughout the British Empire is as desirable as it would be difficult; but even a unified imperial rule is too narrow for the conflict of laws. The remedy suggested requires no conference, no treaty, no legislative perpetuation of an exception to the basic principle of divorce jurisdiction. It calls simply for a short English statute enabling a married woman to acquire a separate domicile and repealing legislation conferring jurisdiction in divorce and the annulment of voidable marriages⁴⁴ on the basis of residence or quasi-domicile. By this means the status theory of divorce would be maintained through adherence to domiciliary jurisdiction; universal (and not merely imperial) recognition would be assured for all divorce decrees; and the various legislatures of the Commonwealth would at last be freed from the fetters of a Privy Council decision⁴⁵ which they have long resented and tried to circumvent by local legislation. Under such a proposal recognition ceases to be a problem. It becomes simply the application of a principle. Had the terms of reference of the Committee on Procedure in Matrimonial Causes extended to substantive law, it may well be that its first recommendation would have taken the form of some such proposal as that made above, instead of being confined to the fictitious procedural device of exercising jurisdiction 'as if both parties were at the material times domiciled here'.⁴⁶

3. SEX DISCRIMINATION IN DIVORCE AND NULLITY JURISDICTION

The English law of marriage and matrimonial causes represents the last stronghold of inequality of legal treatment of the sexes. For physiological and practical reasons the maximum degree of equality had probably been reached by 1938 so far as the grounds or causes

⁴⁴ Read, *op. cit.*, 232, observed, 'The problem of jurisdiction in the international sense to decree nullity of marriage is at Anglo-Dominion common law in the state of confusion characteristic of an elementary stage of development'. Recognition of nullity decrees is no less chaotic—*e.g.*, *Ogden v. Ogden* [1908] P. 46; *Chapelle v. Chapelle* [1950] 1 All E.R. 236—see note by Mr. Rupert Cross, 3 I.L.Q. 247 ff. None of the grounds of recognition of foreign nullity decrees (except that based on *Armitage v. Att.Gen.* (above)) mentioned in Dicey's Rule 73 covers jurisdiction corresponding to that in s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, but some authority exists in *Mitford v. Mitford* [1923] P. 130—see Dicey, *op. cit.*, 384.

⁴⁵ *Att.-Gen. for Alberta v. Cook* (above).

⁴⁶ Final Report, 30, 31.

were concerned to which judicial remedies could be applied.⁴⁷ No such reasons can apply to inequalities in the basis of jurisdiction, the chief of which rests on the identity of the wife's domicile with that of her husband and, in the sense that he alone controls their common domicile and is thus able to select the jurisdiction for divorce or annulment, makes him to some extent judge in his own cause. The injustice of this inequality becomes more glaring when related to the rule of common law conflict of laws that the grounds for divorce (if not annulment) are governed by the *lex fori*, so that even the assurance of practicable equality of treatment in substantive law is gravely endangered.

Reference has already been made⁴⁸ to the expression of judicial concern over the wife's position, and to legislative measures to improve it. Beginning in 1937,⁴⁹ Parliament has enacted in favour of the wife jurisdictional provision designed to counterbalance in the cases of greatest hardship the husband's control over her domicile. This policy has reached its present peak in the Act of 1949, under which jurisdiction in divorce on the basis of residence is available only to a wife,⁵⁰ whichever party is at fault. The same rule applies to proceedings for nullity of marriage.⁵¹ Furthermore, while jurisdiction to decree presumed death and dissolution of marriage⁵² is confined to a basis of domicile in the case of a husband, residence provides an alternative basis for a wife's petition.⁵³ In this Act the scales of justice have clearly tipped in favour of the wife. The anomaly of these provisions may be illustrated by two simple examples relating to a husband and wife, Italian nationals, who are and always have been domiciled in Italy. (a) The wife runs away with her lover and they live together in England for three years. She then petitions the English court for divorce. The court has jurisdiction.⁵⁴ The husband, unable to obtain a divorce in Italy, follows the wife to England and cross-petitions for divorce on the ground of her adultery. The court has no jurisdiction to entertain the cross-petition. (b) The husband, who served in the Italian

⁴⁷ Matrimonial Causes Act, 1937. However, there is no provision rendering voidable a marriage on the ground that the husband, at the date of marriage, was the prospective father of a child subsequently born, of which some person other than the wife was the prospective mother: cf. s. 7 (1) (d).

⁴⁸ Above, s. 1.

⁴⁹ Matrimonial Causes Act, 1937, s. 13. See also Matrimonial Causes (War Marriages) Act, 1944.

⁵⁰ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1).

⁵¹ *Id.*, s. 1 (2).

⁵² Matrimonial Causes Act, 1937, s. 8 (1).

⁵³ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (3). See note by Mr. Rupert Cross on *Wall v. Wall* [1949] 2 All E.R. 927; 3 I.L.Q. 246, 247.

⁵⁴ *Id.*, s. 1 (1). This does not mean, of course, that a decree would be pronounced in the wife's favour, or even that, if it were, it would be of any value to her outside England.

army, has been missing since 1942. The wife, after three years' residence in England, petitions for a decree of presumption of death, and divorce. The court has jurisdiction.⁵⁵ Let us vary the facts and assume that the wife of an official of the Italian Embassy in London has vanished while on a sea voyage from Italy to England. The husband petitions the High Court for a decree of presumption of death, and of divorce. The court has no jurisdiction.⁵⁶

No ambiguity arises on the purpose and intent of these provisions. They are clearly designed to do justice to the wife by providing compensatory jurisdictional bases for her lack of control over her domicile, as were the jurisdictional provisions of the Acts of 1937 and 1944. But all these counterbalances to legal inequality between the sexes are in effect no more than piecemeal palliatives of an outmoded and unnecessary sex disability. They take the more difficult course in failing to attack the root of the problem. No apology is offered for reiterating that this is the dependence of the married woman's domicile on that of her husband. A single, simple solution would remove the cause of the wife's jurisdictional disability. No longer would a succession of well-intentioned but misdirected half-measures be required. The incongruous situation of maintaining the wife's domiciliary disability and at the same time attempting, with little hope of international recognition, to mitigate its consequences, is one which reflects small credit either on the genius of the common law or the omnipotence of Parliament.

4. THE PRINCIPLE OF UNITY OF DOMICILE OF HUSBAND AND WIFE

This euphemistic formulation of the principle of the legal subjection of the wife to the domicile of the husband is, of course, part of a wider status relationship ante-dating the emancipation of the married woman by a thousand years. Bracton, Glanvil, Littleton, Coke and Blackstone treated this relational status as an axiom of the common law.⁵⁷ The special attention which its domicile aspect attracts rests on its character as the only legal survival of significance in modern English law of the disabilities of the married woman. The principle has not escaped criticism: its very nature invites it; and, in the traditional understatement of Dicey, 'the doctrine runs contrary to the general legal trend towards sex equality'.⁵⁸

⁵⁵ *Id.*, s. 1 (3) (b).

⁵⁶ *Id.*, s. 1 (3) (a).

⁵⁷ These authorities were quoted (or misquoted) by the Judicial Committee of the Privy Council in support of its opinion in *Att.-Gen. for Alberta v. Cook* (above): see the writer's article on 'The Domicile of a Widow in the English Conflict of Laws', B.Y.I.L. 1949.

⁵⁸ *Op. cit.*, 107.

Informed opinion is almost unanimous in its condemnation.⁵⁹ Its indictment was drawn in 1946 in these vigorous terms, 'The social consequences of the rule are so disastrous that one doubts whether it can be tolerated much longer by a civilised community'.⁶⁰ The inappropriateness of the rule of unity of domicile to modern conditions has been widely and convincingly expressed, particularly in Canada where the common law rule may be, and has been, unfavourably compared with the more enlightened doctrine of the United States.⁶¹

Proposals for legislation to ameliorate the wife's position, as is well known, have not been lacking.⁶² The suggestion made above for statutory enactment of the wife's capacity by English law to acquire an independent domicile could have no worse effect (to put it at its lowest value) than have statutory measures basing divorce jurisdiction on her residence. In the words of Professor Read,

'If, therefore, the spouses were allowed to acquire separate domiciles, it would seem that on the principle expressed by Lord Justice Brett⁶³ . . . the community of the domicile of each party would have a vital interest in the existence of the marriage *res*, and thus have power to destroy it. Theoretically, it should then follow that the law district in which either of the spouses was domiciled, which first exercised its power to dissolve the marriage status or *res*, would destroy it effectively for all purposes everywhere. This solution would be no more out of accord with "legal reason" and would be more suited to the facts of social life than many of the doctrines which have been watermarked as "Law".'⁶⁴

The statutory conferment on a married woman of capacity to acquire an independent domicile is in principle bound up with the need for some English choice of law rule governing capacity to acquire domicile generally.⁶⁵ But while no valid reason is known to prevent Parliament simply conferring this capacity on a wife,

⁵⁹ Cheshire, *op. cit.*, 478; Falconbridge, *op. cit.*, 613-4; Read, *op. cit.*, 203 ff.; Kahn-Freund, note in 5 Modern L.R. 66 (1941); Tuck, XXII Can.Bar Rev. 686; Morris, XXIV Can.Bar Rev. 73; Final Report of the Committee on Procedure in Matrimonial Causes (Cmd. 7024), para. 82.

⁶⁰ Morris, *loc. cit.*

⁶¹ Read, *op. cit.*, Ch. 6, in which (at 242) he refers to 'the cramping effect of the reactionary and shortsighted decision of the Privy Council in *Att.-Gen. for Alberta v. Cook*', commenting, 'Devious indeed are the bypaths which the courts which desire to be just to deserted women must tread to avoid the rule perpetuated by that decision'; Falconbridge, *op. cit.*, Ch. 40; Tuck, *loc. cit.*

⁶² Cheshire, *op. cit.*, 478, and 61 L.Q.R. 352-72; Final Report of Committee on Procedure in Matrimonial Causes (1947), 30, 31.

⁶³ In *Niboyet v. Niboyet* (1878) L.R. 4 P.D. 1, 13.

⁶⁴ *Op. cit.*, 212, 213.

⁶⁵ 3 I.L.Q. 149 ff.

experience of statutory choice of law rules⁶⁶ points a strong preference for leaving the general question to be worked out by the courts.⁶⁷ The need for action in both senses is urgent, as a consideration of the example given elsewhere⁶⁸ will show.

These few remarks on the general principle of unity of domicile of husband and wife have relevance for the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1, for in that section Parliament has almost done the kind of thing that the writers on constitutional law always said it could do. It has both affirmed and repudiated the doctrine of unity of domicile. In both praise and disparagement of this remarkable performance it should be said that the repudiation of the doctrine was incidental, limited in scope and possibly unintentional. This duality of approach is apparent on a contrast of the first and third subsections of section 1 of the Act.

Section 1 (1) confers jurisdiction on the High Court on the basis of the wife's ordinary residence for three years, her husband being domiciled abroad. This jurisdiction is exceptional to the basic principle of the exclusive competence of courts of the domicile. The fact that it is necessary to base jurisdiction on residence presupposes that jurisdiction based on domicile does not exist in the circumstances mentioned. In other words the subsection affirms the dependence of the wife's domicile on that of her husband. Yet this jurisdiction is conferred 'notwithstanding that the husband is not domiciled in England'. The section, that is to say, avoids the direct denial that the wife is not domiciled in England. Two possible alternative deductions from this ambiguity are: (a) a reluctance on the part of Parliament to emphasise the absence of any claim to jurisdiction on the internationally recognised ground of domicile, particularly in view of difficulties of foreign recognition of English decrees under the Act; or (b) an assumption that the principle of dependence of the wife's domicile on that of her husband is so firmly rooted in general doctrine that Parliament expressed the premise of the husband's domicile rather than the consequence of the wife's. Insufficient evidence exists to express an opinion in favour of either construction; but whichever view is adopted will apply equally to nullity jurisdiction under section 1 (2).

Section 1 (3) (a) of the Act confers (or, more probably, confirms) the jurisdiction of the High Court to make a decree of divorce

⁶⁶ Morris, 'The Choice of Law Clause in Statutes', 62 L.Q.R. 170 (1946).

⁶⁷ In *Chapelle v. Chapelle* [1950] 1 All E.R. 236, which involved the recognition of a foreign nullity decree, a difference of domiciles of the parties to a voidable marriage formed the basis of the reasoning. See note by Mr. Rupert Cross, 3 I.L.Q. 247 ff.

⁶⁸ 3 I.L.Q. 154.

supplementary to a decree of presumption of death of one spouse on the petition of the other if the latter is domiciled in England, 'and in determining for the purposes of this subsection whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living'. Additionally, section 1 (3) (b) gives similar jurisdiction, but only on a wife's petition, on the basis of three years' ordinary residence.⁶⁹ The object of section 1 (3) (a) is clearly to give the wife an independent domicile for the special purpose of jurisdiction, though it may well be that she would be held under this provision to have an independent domicile for all purposes, since special and limited domiciles are quite contrary to the English doctrine. The effect of the provision is that the wife becomes subject to the normal rules of domicile affecting a person *sui juris*,⁷⁰ not from the date of her husband's death, not even from the date of the decree presuming his death but, in order to give the necessary jurisdiction on which such a decree could be pronounced, immediately after the last occasion on which the wife knew or believed her husband to be alive. The chances of the husband having died at that very moment are extremely remote, and it is in recognition of the husband's possibility of survival that a decree of divorce is coupled with that of presumption of death.⁷¹ A legal problem of some nicety would be presented to the courts by such a case as this:

W, the wife, domiciled in England, in 1930 married in England H, the husband, a German domiciled in Germany but resident for business purposes in England. In 1939, just before the outbreak of war, H disappeared and has not been heard of since. W petitioned in 1950 for a decree of presumption of death of H and of divorce, which were granted. Shortly afterwards H reappeared and appealed against the decree of divorce on the ground that the court had no jurisdiction, because W, being his wife, was all the time domiciled in Germany.

Apart from the point of whether a person judicially and legally presumed dead (apparently an irrebuttable presumption) can appear at all as a party to English proceedings, the Court of Appeal would, it is submitted, be bound to reject the appellant's plea to the jurisdiction, holding that by virtue of section 1 (3) of the Act of 1949 the wife was empowered to acquire an independent domicile, and

⁶⁹ Because of this residence basis of jurisdiction the passage cited from the subsection, though following s. 1 (3) (b), can only relate to s. 1 (3) (a).

⁷⁰ See note in 3 I.L.Q. 247.

⁷¹ *Wall v. Wall* [1949] 2 All E.R. 927, in which (before the Act) jurisdiction was exercised on the ground of the petitioning wife's residence.

that she had done so in England between 1939 and 1950. Such a decision would go much further than the normal presumption on a wife's divorce petition (her husband having disappeared) that an existing domicile continues until evidence to the contrary is adduced.⁷² The effect of the subsection is that, on last hearing of her husband, the wife either may acquire an independent domicile of choice in England, or until she does so, possibly resumes her domicile of origin, her domicile of dependence on her husband having come to an end. It is submitted that it would be contrary to the intention of this provision that a wife to whom the subsection applies should continue to have a domicile dependent on that of her husband in any interval which may exist between his last being heard of and her acquisition of a domicile of choice. The following imaginary case illustrates the suggestion :

W, having an English domicile of origin, in 1930, married H (the husband), who was then domiciled in Roumania. The parties lived together in France and Belgium until H disappeared in 1941. In 1942 W was placed in a German concentration camp and on her release in 1945 was found to be insane. Having recently recovered her sanity, she returns to England in 1950 for the purpose of presenting a petition under section 1 (3) (a) of the Law Reform Act, 1949. The English court should exercise jurisdiction on the ground that W is domiciled in England, her domicile of origin having revived on the disappearance of H in 1941, unless she acquired an independent domicile of choice in Belgium between 1941 and 1942 by remaining there voluntarily, *i.e.*, not simply because she had no choice in the matter owing to war conditions.

The Act became law seven days after Hodson J.'s decision in *Re Wallach, decd.*,⁷³ in which he held that the domicile of origin of a woman does not return to operation on the ending of her domicile of dependence by the death of her husband. This decision is in certain respects unsatisfactory and incompatible with the general principles of domicile,⁷⁴ and has, it is submitted, been qualified in the sense indicated above by the later statute. But this is, indeed, a minor point when viewed in relation to the fact that, in this subsection alone, Parliament has conferred on the married woman capacity to acquire an independent domicile. The provision has a juristic significance far beyond its limited jurisdictional purpose, for it constitutes the first statutory breach

⁷² Cheshire, *op. cit.*, 477 (iv).

⁷³ [1950] 1 All E.R. 199; 66 T.L.R. 132.

⁷⁴ Cf. note by the learned editor, 3 I.L.Q. 259-262. The case is considered more fully in B.Y.I.L. 1949, sub-tit. 'The Domicile of a Widow in the English Conflict of Laws'.

in the principle of unity of domicile of husband and wife.⁷⁵ In contrast to the Dominion legislation considered by Read⁷⁶ and referred to above, no question arises in the English Act of giving the woman a fictitious or quasi-domicile. The fiction in the subsection relates, not to the wife's domicile, but to the death of her husband as soon as he was last known to be living.

5. CHOICE OF LAW IN DIVORCE AND NULLITY

The Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (4), provides that in cases falling within the provisions of that section, of the Matrimonial Causes Act, 1937, s. 13, or of the Matrimonial Causes (War Marriages) Act, 1944, s. 1, 'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings'. In the case of divorce proceedings this would be English law as *lex fori*, whether under the special provisions mentioned or under general law, and no problem of choice of law arises. It is merely of interest to contrast the third recommendation of the Committee on Procedure in Matrimonial Causes, which would permit divorce jurisdiction on the basis of residence of both parties 'provided that the law of the place where the parties are domiciled recognises as sufficient cause for a decree of divorce or nullity the same cause as that for which it is sought here'.⁷⁷

The acute choice of law problems in nullity of marriage, on which so much has been written in the past two years, is, if anything, complicated still further by the provisions of the 1949 Act. In the first place, section 1 (4) of the Act lays down a choice of law rule only for a limited class of cases; those, that is, which fall within the provisions mentioned above. To all other cases will apply the normal choice of law rule, whatever it may be. The cases to which the new statutory rule for choice of law applies would appear to be the following:

- (a) proceedings by the wife only on the basis of three years' ordinary residence;⁷⁸
- (b) proceedings by either party⁷⁹ where the wife has been

⁷⁵ As contrasted with s. 1 (1) of the Act, Matrimonial Causes Act, 1937, s. 13, and Matrimonial Causes (War Marriages) Act, 1944, s. 1, all of which preserve the principle of unity of domicile and merely create exceptions to exclusive domiciliary jurisdiction in divorce and certain other causes.

⁷⁶ *Op. cit.* 223 ff.

⁷⁷ Cmd. 7024, p. 31. The fourth recommendation (*loc. cit.*) extends this principle to the recognition of foreign decrees.

⁷⁸ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (2).

⁷⁹ Matrimonial Causes Act, 1937, s. 13. The intention of this section and the circumstances anticipated by it almost necessarily mean that proceedings will be by the wife; but the section contains no specific limitation of this kind

deserted by the husband or the husband has been deported, having had immediately before such desertion or deportation an English domicile;

- (c) proceedings by either party⁸⁰ to a marriage celebrated in England between September 3, 1939, and the 'appointed day'^{80a} when the husband was, at the time of marriage, domiciled outside the U.K. and the wife was, immediately before the marriage, domiciled in England and the parties have not, after marriage, resided together in the country of the husband's domicile.⁸¹

Cases impliedly excluded from the operation of section 1 (4) are, therefore, the following:

- (x) proceedings by a husband in a normal case, *i.e.*, one not falling under the provisions of (b) or (c) above;
- (y) proceedings by a wife on a jurisdictional basis of domicile⁸²;
- (z) possibly, proceedings by a husband under the Matrimonial Causes Act, 1937, s. 13, or under the Matrimonial Causes (War Marriages) Act, 1944, s. 1. Such would be the case if the courts were to hold that proceedings under these provisions were available only to a wife.

For the purpose of the Act we are, accordingly, only concerned to ascertain the choice of law rule applicable to groups (a), (b) and (c) above, and to discover any differences which may exist between the statutory and the normal choice of law rules. Particularly in conflicts rules affecting matrimonial causes the choice of law problem must be broken down into its constituent questions of, *which law?* and *at what date?* Section 1 (4) of the Act is a choice of law rule by reference; reference, that is, to 'the law which would be applicable if both parties were domiciled in England at the time of the proceedings'. Thus, all we have to do is to find out what law would be applicable under such circumstances. The answer is simply that we do not know, because in the first place the existence of a general choice of law rule is unsettled, and secondly the circumstance of an English domicile at such a date is not of decisive significance under such general law as exists for the choice of law question,

and it is possible to envisage a case in which the deserting husband, having a foreign domicile, petitions in England for divorce on the ground of his wife's adultery or for nullity of marriage.

⁸⁰ Substituting the allied soldier domiciled abroad but serving in England for the deserting or deported husband, the same observations apply as in the preceding note.

^{80a} June 1, 1950—The Matrimonial Causes (War Marriages) (Appointed Day) Order, 1950 (SI No. 672 of 1950). See *post*, pp. 417-8.

⁸¹ Matrimonial Causes (War Marriages) Act, 1944, s. 1.

⁸² Section 1 (4) only applies to the wife's petition on the basis of domicile in s. 1 (3) (a) in respect of divorce, not of nullity.

and is decisively relevant only to the question of choice of jurisdiction. If a choice of law rule is needed at all, the statutory choice of the domiciliary law is in principle unimpeachable, though in certain respects, as we shall see, it is too widely drawn. The point of interest lies in trying to ascertain Parliament's object in connecting this principle with the time of proceedings instead of the date of marriage.

We have already indicated⁸³ that the application of a choice of law rule other than the *lex fori* to cases of annulment of voidable marriages by the Court of Appeal⁸⁴ is a recent innovation, and have questioned the need for such an extension in view of its absence from the law of divorce, both proceedings involving the ending of an existing status of marriage. It would be completely in accord with the law before *De Reneville's Case* to regard the statutory choice of law rule here considered as a simple and straightforward confirmation of pre-existing general law and of the view advocated by the new Dicey's *Conflict of Laws*⁸⁵: in other words, the choice in favour of *lex fori*. As this is the invariable choice in matters of purely municipal concern, it is in fact only by courtesy that one can describe it as a choice of law rule at all. In short, it confirms the pre-*De Reneville* position in which no choice of law problem existed either in divorce or the annulment of voidable (as distinct from void) marriages.

De Reneville's Case did not fall under any of the statutory provisions mentioned in section 1 (4) of the 1949 Act, but under general law. The rule for choice of law which it is generally considered to have laid down is that of the domicile of the husband at the time of the marriage, though this single test is too simple a statement of the multiple criteria expounded by the Court of Appeal.⁸⁶ Indeed, the reference to 'the time of marriage' does

⁸³ 12 *The Conveyancer and Property Lawyer* (1948), 185 ff.

⁸⁴ *De Reneville v. De Reneville* [1948] 1 All E.R. 56.

⁸⁵ Rule 36 (2), p. 259.

⁸⁶ 'It is a case of essential validity. By what law is that to be decided? In my opinion, by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view), because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage'—*per* Lord Greene M.R., *De Reneville v. De Reneville* [1948] 1 All E.R. 56 at 61. 'For this reason I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they, in fact, lived together should be regarded as the law which controls the validity of their marriage'—*per* Bucknill L.J., *id.*, at p. 65. It is, of course, possible that this part of the judgment of Bucknill L.J. was intended, not as a composite test for a choice of law rule, but as a descriptive justification of his selection of the law of the husband's domicile, which at the dates both of marriage and of the hearing was the same. See and compare note by Kahn-Freund in 13 *Mod.L.R.* 227-9, which appeared too late for comment in this article.

not appear to have the purpose of identifying the selected law for application as of that date, but merely to support the choice of the so-called 'matrimonial domicile', which would be applied as of the date of proceedings, not of marriage. The analogy to the proper law of contract is strong, even to the point of the date at which such law should be taken in English proceedings. Because in *De Reneville's Case* the husband's domicile was the same at all material times, and because no evidence whatever of French law was given, it is submitted that the court's statement of the choice of law rule leaves unanswered the question of the date as of which the law of the domicile must be applied. By analogy to the proper law of the contract this should be the date of proceedings; by analogy to the law governing the essentials in marriage this should be the law of the domicile at the date of the marriage.⁸⁷ One cannot, however, agree that a ground of voidability is either an essential in marriage or should be treated as such.⁸⁸ This failure of the court to fix the date of the choice of law rule has scarcely been remedied in a later judgment purporting to follow *De Reneville's Case*, for the selection of the law of the husband's domicile is supported by the use of both the past (date of marriage) and the present (date of proceedings) tenses.⁸⁹

In the midst of this uncertainty a very pertinent question arises: what is the point of exercising jurisdiction in nullity of marriage merely, by the choice of some foreign law, to deny to the petitioner the remedy which would be available if English law were applied? The justice and reasonableness of applying English law has hardly been questioned in matters of divorce. We cannot see any practical reason for refusing to apply the same principle when jurisdiction over voidable marriages is exercised on the basis of domicile, the law which should govern, not only the creation and existence of status, but its dissolution at all times. When one looks at the

⁸⁷ *Brook v. Brook* (1861) 9 H.L.C. 193. The argument between Fleming (11 Mod.L.R. 101 and 3 I.L.Q. 18) and Cross (Dicey, *op.cit.*, 259-267) on the date as of which the choice of law rule should be taken seems to turn on whether one adopts the formal and technical retrospective effect of a nullity decree or the substantive point of termination of an existing status as decisive of the matter.

⁸⁸ 12 *The Conveyancer and Property Lawyer*, 188.

⁸⁹ *Casey v. Casey* [1949] 2 All E.R. 110. Bucknill L.J. asks: 'Should the question whether this marriage is void or voidable be decided by English law or Canadian law? The passage in Lord Greene's judgment in *De Reneville's Case* which I have already cited indicates that the law applicable is the law of Canada, because the husband is domiciled in Canada, and because *at the date of the marriage it was* the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage'—*id.*, 115, 116 (italics supplied). The divergence of this test from that in *De Reneville's Case* is conspicuous, particularly when taken with the passage immediately following the above citation from the judgment of Bucknill L.J. Cf. his judgment in *De Reneville v. De Reneville* [1948] 1 All E.R. 56, at 65.

particular cases covered by section 1 (4) of the Law Reform Act, 1949, the answer to this question becomes even more obvious. It is suggested that the choice of law in favour of the domicile at the date of proceedings should become the general choice of law rule in nullity of voidable marriages wherever jurisdiction is based on domicile. As the learned specialist editor of Dicey remarks,⁹⁰ writing before the Act of 1949, 'Thus, if a case comes within section 13 of the Matrimonial Causes Act, 1937, or the Matrimonial Causes (War Marriages) Act, 1944, it is almost incredible that any law other than English law, as that of the country in which the parties are assumed to be domiciled, should be applied'. Jurisdiction in voidable marriages exercised at large on some other basis than the domicile of the parties, such as that of their common residence, would be contrary to the principle of domiciliary control over the status. If such an extension of jurisdiction were made—and the Court of Appeal has twice refused to commit itself on this point⁹¹—a strong case could be made for applying the law of the petitioner's domicile as it exists at the date of proceedings. In so far as *De Reneville's* and *Casey's Cases* may now be regarded as establishing a choice of law rule in favour of the husband's domicile at the date of marriage, it is suggested that the test differs from that in s. 1 (4) of the Act, and that the true intent of this section can only be effected by regarding it as providing that in matters referred to the law of the domicile, this shall be deemed to be English law at the date of proceedings. This confirms the course taken by the High Court in *Hutter v. Hutter*⁹² and *Easterbrook v. Easterbrook*⁹³, so far as concerns the choice of English law in cases of the type falling within s. 1 (4) of the 1949 Act. Because that section deals with a limited class of statutory cases and *De Reneville v. De Reneville* was decided on general grounds, it is clear that the statutory choice of law rule in the section cannot directly qualify any different test which the Court of Appeal may have favoured. It is considered that the subsection contains no such intention; for one reason, the general test is too indecisive at the moment to make statutory amendment appropriate. What the subsection does, however, is very definitely to limit the possibility of any idea of the matrimonial domicile as the general test spreading to statutory cases of annulment, and in a secondary sense to discourage so far as possible the crystallisation of

⁹⁰ *Op. cit.*, 267, note 36.

⁹¹ In *De Reneville v. De Reneville* and *Casey v. Casey* (above). The House of Lords adopted a similar attitude in *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁹² [1944] P. 95.

⁹³ [1944] P. 10.

the general test into a reference to the law of the husband's domicile at the date of the marriage.

There remains one further point of importance in s. 1 (4) of the Act. This provision is drawn in sufficiently wide terms, both in itself and in its reference to earlier statutes, to include both void and voidable marriages. The questions arising on an allegation of a void marriage are two, to each of which there has long applied the settled principles of choice of law, matters relating to form being governed by the *lex loci celebrationis*⁹⁴ and those relating to essentials by the *lex domicilii* of each party immediately before the marriage.⁹⁵ The statutory choice of law made as if 'both parties were domiciled in England at the date of the proceedings'⁹⁶ does not directly affect the reference of essentials in marriage to the law of domicile as it existed before the date of the marriage, since domicile at the date of proceedings is irrelevant to the normal choice of law rule. One may hope that no judicial construction of s. 1 (4) will extend the statutory rule to the question of essentials in an allegation of a void marriage. The arguments advanced in favour of the application to voidable marriages of the law of the petitioner's domicile at the date of proceedings are inappropriate to the completely different situation in a void marriage in which no question of a judicial change of status is involved.

If we may conclude on a note of complete insignificance, s. 1 of the Act contains within itself an apparently curious conflict of legal fictions. Section 1 (4) makes applicable to cases (inter alia) within the section the law which would apply if *both parties* were domiciled in England. But by s. 1 (3) for the purpose of determining the domicile of the wife 'her husband shall be treated as having died immediately after the last occasion' on which he was known to be living. For the purpose of avoiding the possibility of confusion the domiciliary choice of law rule in s. 1 (4) applies equally to divorce as to nullity, even when jurisdiction is exercised on a basis of the petitioning wife's residence. As, however, the presumption of the husband's death in s. 1 (3) is designed to enable the wife to acquire an independent English domicile for the purposes of jurisdiction, from which the application of English law as *lex fori* would automatically follow, resort to the choice of law rule in s. 1 (4) becomes unnecessary, and no real conflict of legal fictions arises.

R. H. GRAVESON⁹⁷

⁹⁴ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 65.

⁹⁵ *Brook v. Brook* (1861) 9 H.L.C. 193; or in Professor Cheshire's view, the law of the matrimonial home. This difference in view is only slightly relevant to the question under discussion, namely, the time as of which the choice of law rule shall be taken.

⁹⁶ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (4).

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GERMAN ENEMY PROPERTY

SYNOPSIS

- I. German assets in the U.K.
- II. The international agreements relating to German assets in the U.K.
 - (a) The Paris Agreement on Reparations.
 - (b) The Brussels Rules of Accounting.
 - (c) Agreements in Intercustodial Conflicts.
- III. The structure of the Distribution of German Enemy Property Act, 1949.
- IV. The definitions of 'Germany' and 'Property'.
- V. Section 8 of the Act in general.
- VI. The requirement of custodian control.
- VII. The requirement of enemy character of the holder.
 1. The German State.
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 - (a) Problems of nationality.
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- VIII. The requirement of relationship between holder and property.
 - (a) Section 4 of the Custodian Order.
 - (b) The Act and the Brussels Rules.
 - (c) The problem of internal restitution.
- IX. Section 1 (6) of the Act.

I

At the outbreak of the second world-war the assets of all residents of Germany and of certain German nationals were placed under the control of the Custodian of Enemy Property or otherwise subjected to measures of supervision and liquidation authorised by the Trading with the Enemy Act, 1939.¹ As a result of these measures property estimated to be worth approximately 15 million pounds was found to be in the hands of the Custodian of Enemy Property and earmarked as German property. The figure of 15 million pounds which has been officially stated to be the approximate total,² has been considered to be surprisingly low by

¹ 2 & 3 Geo. 6, c. 59.

² *Hansard*, House of Commons, Vol. 469, No. 185 (Tuesday, November 15, 1949), col. 1869; House of Lords, Vol. 165, No. 132 (Tuesday December 6, 1949), col. 1209. At the outbreak of the first world war German assets in England were estimated to be worth £96,000,000, see Garner *International Law and the World War*, Vol. 1 (1920), p. 86, note 1.

many members of the interested circles, especially as the amount of German indebtedness to Britain at the outbreak of the war is stated to have been no less than 120 million pounds. It is, however, not difficult to understand the reasons for the discrepancy between German debts and German assets in this country. Germany was subject to a strict régime of exchange control ever since 1931, while no similar restrictions existed at the time in question in this country. German traders were, therefore, compelled to surrender their foreign assets to the German Reichsbank as soon as they had gained the power of disposing of them. The Reichsbank on the other hand was—at least since 1938—well aware of the possibility of the outbreak of hostilities and—keeping in mind the experience made during the first world war and the loss of all German assets in Allied countries—carefully reduced the credit balances available abroad.³ There can also be little doubt that some German industrial circles were sufficiently well-informed or far-sighted enough to withdraw their assets to countries which could be expected to remain neutral or to repatriate their property to Germany. Unlike the first world war, the second world war did not come unexpectedly. International trade had considerably shrunk during the year preceding it. German debts are largely not trading debts, but debts contracted in the inter-war period in consequence of investments in Germany between 1924 and 1930. German assets, on the other hand, unlike during the first world war, comprise only to a small extent property of persons of German nationality residing in this country at the outbreak of the war. The German colony in this country was small, the majority of residents of German nationality being refugees from Nazi oppression who did not return to Germany at the outbreak of the war and whose property was therefore not subjected to any measures of control or was released to them after due investigation of the circumstances of the individual case.

Creditors of German debtors have for well over a decade been in the unfortunate position of being unable to collect their debts. This has led to particularly undesirable results in those cases in which the debt could have been amply satisfied by assets belonging to the debtor and available in this country at the outbreak of the war. To mention only one typical case: agents of German firms were unable to collect the commission due to them for orders which

³ A survey of the various 'calls' for the surrender of foreign property by the German authorities will be found in Flad-Berghold-Fabricius, *Das neue Devisenrecht, Kommentar*, 2nd ed. (loose-leaf edition), pp. A 151 ff. See furthermore the general rules contained in section 46 ff. of the Gesetz über die Devisenbewirtschaftung of December 12, 1938 (RGBl I, 1733). See also Schacht, *Account Settled* (1949), pp. 111 ff.

they had obtained, even though the German manufacturer had long delivered the goods and the price been paid to the German manufacturer's banking account in this country, where it was still standing to his credit at the outbreak of the war. Such banking accounts were after the outbreak of the war paid over to, or held under the directions of, the Custodian of Enemy Property, who on his part had no power to settle any of the German debtor's obligations—not even in respect of expenses incurred in connection with work of which the Custodian himself had derived the benefit. Neither the German creditors of British debtors nor the American creditors of German debtors had to put up with a similar waiting period under the respective laws of their countries.⁴ There can be little doubt that the payment to creditors of German enemy debts under the Distribution of German Enemy Property Act, 1949, is a measure which for some time past has been due.

II

(a) In deciding about the fate of German assets in this country Parliament was not any longer entirely free to do what it might wish to do with these assets. This country was bound by a number of important international agreements which—in accordance with the principle of 'unconditional surrender'—had been concluded without any participation of German representatives.

At the Potsdam Conference this country and the U.S.A. renounced their claim to obtain satisfaction for their reparation claims from German assets in Bulgaria, Finland, Hungary, Roumania and Eastern Austria. Concurrently, the Soviet Union renounced their corresponding claims in respect of German assets in all other countries. This was followed by the Agreement on Reparation from Germany, on the Establishment of an Interallied Reparation Agency and on the Restitution of Monetary Gold of January 14, 1946.⁵ Under Article 6A of this Agreement

each Signatory Government shall, under such process as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control, and shall charge against its

⁴ See s. 34 of the (U.S.A.) Trading with the Enemy Act, added by Public Law 671, of August 8, 1946 (reprinted in Domke, *The Control of Alien Property*, Vol. 2 (1947), p. 230. Under German law an enemy can sue and be sued in the courts and as the German courts have jurisdiction over all persons possessing property within their territories, it was possible for a German creditor to obtain a judgment against his enemy debtor, although the enforcement of the judgment will as a rule have required permission from the exchange control authorities, see s. 10 of the Ordinance on the Treatment of Enemy Property of January 15, 1940 (*Reichsgesetzblatt* I, p. 191).

⁵ Treaty Series, No. 56 (1947), Cmd. 7173.

reparation share such assets (net of accrued taxes, liens, expenses of administration, other in rem charges against specific items and legitimate contract claims against the German former owners of such assets).

The Paris Agreement determined the share of each individual allied country in the reparations to be obtained from Germany. For this purpose two categories of reparation are formed. Category B consists of industrial and other capital equipment removed from Germany (this accounts for part of the so-called dismantling), merchant ships and inland water transport. Category A consists of all other forms of reparation. The importance of Article 6a consists therefore in the establishing three rules. In the first instance German enemy assets in the territories of the signatory countries must not be allowed to return into German hands. The total release of all German assets, which has taken place in a number of South American countries, is therefore not permissible in any of the eighteen Signatory States. Secondly, the assets thus retained are charged against the reparation account of the individual Signatory Government. Lastly, the items in the brackets, such as *e.g.* legitimate contract claims against the former owners of the assets in question, are to be deducted from the charge. This means in the case of this country that the 15 million pounds in the hands of the Custodian are to be charged against the share of this country—amounting to 28 per cent.—in the Category A reparations. From this charge, however, the bracketed items can be deducted. To give an example: to the extent to which the said assets are used to pay British creditors of German owners of individual assets under Custodian control, they are not charged on reparation account. To the extent, however, to which the assets in question are used to pay British creditors of German debtors not possessing assets in this country, the payment to the creditors must be debited against the reparation account.

(b) The Paris Agreement has been supplemented in a most remarkable manner by another agreement—strangely enough hardly mentioned during the Parliamentary debate on the Act—which contains much more explicit rules on the fate of German assets in the Signatory countries. One of the purposes of the Paris Agreement was the establishment of the Interallied Reparations Agency at Brussels. The second part of the Paris Agreement contains in fact—though in a somewhat rudimentary form—the constitution of this body. Article 2 of this second part provides that—

the Agency shall allocate German reparation among the Signatory Governments in accordance with the provisions of this

agreement and of other agreements from time to time in force among the Signatory Governments.

More particularly, article 5 allots the function of making these allocations to the Assembly of the Agency. The Assembly is a body in which each of the Signatory Governments is represented by one delegate. Each delegate has one vote. The principle of equality of sovereign States has, it seems, been victorious over the, it is submitted, much more reasonable principle, that in a meeting of creditors the voting power follows the value of the claim. Thus, Albania and Egypt whose share in the category A reparations is 0.05 per cent. in each case, and Luxembourg, whose share is 0.15 per cent., have the same voting power as the U.S.A. and this country, whose respective shares are 28 per cent. in each case, and as France whose share is 16 per cent. The total number of delegates is eighteen. Delegates representing not more than a total of 9.90 per cent. of the Class A reparations and 13.70 per cent. of the Class B reparations have altogether ten delegates and therefore a clear majority. The three smallest reparation creditors who are altogether entitled to a share of 0.25 per cent. have the same voting power as countries whose total of class A reparations is 72 per cent. and of B reparations 62.40 per cent.

By a resolution dated November 21, 1947,⁶ this Assembly laid down a number of rules of accounting which further define both categories under discussion in the present connection: *i.e.*, the assets to be charged against the reparation share and the deductions permissible from these assets. The rules are framed as 'rules of accounting'. They do not always clearly evince the influence of legal draftsmanship. In many cases they are surprisingly indefinite, leaving a great deal of scope to the discretion of the individual Signatory Government, as *e.g.*, by providing that certain assets need not be charged against the reparation account, if 'they are intended to be released'. But keeping all this in mind, it is still clear that the Brussels rules have in a remarkable manner anticipated some of the decisions now made by Parliament in the Act at present under discussion.⁷

⁶ Obtainable from the Secretary General of the Interallied Reparation Agency.

⁷ The present paper deals exclusively with the *lex lata* as it faces the English legal practitioner. There is no intention of including within its scope the question as to the rules (if any) of international law on the treatment of enemy property at the end of hostilities. See on this Lord Simon's pertinent remarks at the third reading of the Distribution of German Enemy Property Bill in the House of Lords, *Hansard*, Vol. 165, No. 135 (Tuesday, December 13, 1949), p. 1474, Borchard, 'Nationalisation of Enemy Patents' in *American Journal I.L.*, Vol. 37 (1943), pp. 92 ff., Sommerich, 'Recent Concepts as to the Alien and his Property' in *American Journal I.L.*, Vol. 37 (1943), pp. 58 ff. and the most interesting articles by Sommerich, 'A Brief against Confiscation' in *Law and Contemporary Problems; Enemy Property*, published by the

(c) A further series of Agreements has been concluded by this country in respect of enemy assets consisting of bilateral—not of multilateral—arrangements. These refer to what is generally called ‘intercustodial conflicts’. Intercustodial conflicts may be defined as cases in which owing to the presence of points of contact with more than one allied country, it may appear doubtful which allied country has jurisdiction to liquidate German assets. Thus, where a resident of the U.S.A. died after appointing by his last will a German resident as the sole beneficiary of his will, but had nominated a U.S.A. resident as his executor or trustee while the bulk of his property is situated in this country, it may well be doubted whether the Custodian of Enemy Property in this country or the Alien Property Custodian in the U.S.A. is entitled to liquidate the assets in this country. The rules relating to intercustodial conflicts may be called the conflict-of-laws branch of the law relating to Trading with the Enemy. Their importance for all concerned follows not only from the difference in the manner of liquidation, but above all from the fact that, say, U.S. creditors benefit from assets under the jurisdiction of the Alien Property Custodian in the U.S.A., while creditors in this country have the benefit of assets under the jurisdiction of the Custodian of Enemy Property.

The Interallied Reparation Agency has drafted a multilateral convention relating to the topic, but although this has been adopted by a considerable number of countries including the U.S.A. and Canada,⁸ it has not been accepted by this country. The U.K. have proposed a draft of their own and this has been agreed to bilaterally between this country on the one hand and France and the Netherlands on the other, but not as between France and the Netherlands.⁹ The two agreements with France and the Netherlands were already concluded and the former had in fact been ratified at the time when the Distribution of German Enemy Property Bill was debated in Parliament.

Duke University School of Law (Winter-Spring, 1945), pp. 152 ff.; and Seymour Ruben, ‘“Inviolability” of Enemy Property’, *eod. loco*, pp. 166ff. See also the significant remarks by Simonson, *Private Property and Rights in Enemy Countries* (1921), p. ix, which are typical for the point of view taken after the first world war. The complete material on the discussion—especially on the Washington Agreement with Switzerland—is listed in the *Nachrichten der Studiengesellschaft für privatrechtliche Auslandsinteressen* (Bremen, 1949, 4 issues so far published).

⁸ Agreement on the Resolution of Conflicting Claims to German External Assets of December, 5, 1947, see *I.A.R.A., Report of the Secretary-General for the Year 1948*, pp. 22 ff.

⁹ The Agreement with France is Treaty Series No. 74 (1948), Cmd. 7551, and was concluded in Brussels on July 15, 1948. The Agreement with the Netherlands was concluded in London on September 20, 1949; see Netherlands No. 1 (1949), Cmd. 7803.

III

The Act ¹⁰ is in the main an enabling Act granting power either to issue delegated legislation or to take administrative action. Of its twelve sections no less than five contain enabling clauses. As the last four sections deal with the application of the preceding sections to Scotland, Northern Ireland, the Isle of Man and the Channel Islands, this means that only three of its twelve sections create new law. These three operative sections are section 2 which deals with offences against orders made under any one of the enabling sections, section 7 which deals with the expenses and receipts under the Act and—last not least—section 8. Section 8 is easily the most important section of the Act, because it determines a number of definitions employed in the other sections and thus provides the most important limitation of the powers granted by the preceding sections. To the legal practitioner interested in the litigation aspect of the law, it will prove to be by far the most interesting section of the Act, although perhaps—as we shall see in a later connection—it loses some of this interest in consequence of another rule, which we shall have to discuss.

Perhaps the most impressive instance of the overriding importance of section 8 is constituted by its relation to section 3. Section 3 (a) gives power to the Treasury for the purpose of giving effect to intercustodial agreements to direct the administrator of enemy property to transfer to specified persons—presumably the respective foreign equivalents of our Custodian of Enemy Property—the property specified in the direction, but the section clearly prescribes that the property so specified must be German enemy property or the proceeds thereof. The term ‘German enemy property’ is defined for the purposes of the Act in section 8. It is therefore clear that the directions which the Treasury is entitled to make in accordance with section 3 (a) must refer to ‘German enemy property’ within the meaning of section 8 and conversely that the Treasury is not entitled to make directions relating to property which is not German enemy property within the technical meaning of the term as defined in section 8. This may result in strange situations.

Under section 12 of the Agreements with France and the Netherlands ¹¹ where there are assets belonging to a Dutch or French company in which German enemies are interested and which therefore have been put under Custodian control, the Netherlands or French Government is entitled to approach the British

¹⁰ *I.e.*, s. 1 (6).

¹¹ See note 9, above.

Government with a view to deciding in consultation whether either the company or the assets are German controlled. For the purposes of this section the term 'German-controlled' is expressly defined in article 12 (2) of the Agreements. This definition differs strikingly from the definition of 'enemy control' developed by the courts following upon the *Daimler Case*,¹² which, as we shall see, must apply to the interpretation of the term 'enemy control' in the present Act. Thus according to the definition contained in the Agreement a company is deemed to be German-controlled if 50 per cent. of the voting rights are held directly or indirectly by German enemies—even though the entire board of directors consisted at all material times of non-enemies. Thus the 'decision' by the two governments concerned may be ineffective, because if they 'decide' that the company in question is German-controlled the British Government could not take any action with regard to its assets in this country, because they are not German enemy property within the meaning of the Act.

Section 8 of the Act must, however, not be taken to be applicable in those cases in which the terms used therein are not expressly referred to. Thus section 4 of the Act raises a problem which at the first glance may appear to be very similar in character to that of section 3, but whose solution, it is submitted, differs in a remarkable manner from that under section 3. Section 4 envisages the possibility that a government in any colony or protected territory or territory under trusteeship administration places at the disposal of H.M. Government money representing German enemy property. It prescribes that in such a case the property in question shall be dealt with in the same manner as German enemy property within the meaning of the Act. Section 4 does not say that any property thus placed at the disposal of H.M. Government in the United Kingdom can be so used. The decision of the colonial government or government of the protected territory is not to be final. But on the other hand section four does not say that only those assets put at the disposal of the government in the United Kingdom which are covered by the explicit definition in section 8 are to be distributed. Section 4 does not contain a reference to the term 'German enemy property' defined in section 8. In lieu of such a reference it contains a description of the property in question which is separate, and in some important respects different, from that contained in section 8. Section 4 merely requires that property of the type in question must be property which belonged to, or was held or managed for German nationals or bodies incorporated or constituted in,

¹² [1916] 2 A.C. 307.

or under the laws of, Germany or controlled by German nationals. The importance of the difference will appear from the following example. At the outbreak of the war the Government of Tanganyika Territory deported practically all German residents of the territory and placed their property under control.¹³ A considerable number of the persons in question never returned to Germany. Many of them spent the entire war on British territory, being interned and, later on, released in Southern Rhodesia, where some of them have since become British subjects. Property belonging to a person of this description would not be covered by the definition contained in section 8, but this would apparently not prevent the property or the proceeds of it to be used in accordance with the Act, *i.e.*, both for the purposes of satisfying the debts referred to in section 8 and to be liquidated in the same manner as the property covered by the Act. It is not unlikely that this may result in considerable hardships for individuals. But the English courts would, it seems, be unable to afford any assistance in such cases.^{13a}

Section 4 (2) contains a proviso which would appear to go even further. According to this rule the Treasury may direct that money transferred to the Custodian of Enemy Property for England as representing German enemy assets held by the Palestine Custodian of Enemy Property shall be transferred to the administrator. If the Treasury makes such an order, the money so transferred shall be dealt with in the same manner as German enemy property under the Act. The rule is confined to money for the obvious reason that all other assets are now outside British territory. It is understood that the question of the final destination of these moneys is at present the subject-matter of negotiations between this country and the governments of the countries which have been established on the territory of Palestine. As section 4 (2) now stands, it would appear to give to the Treasury final powers of disposition in regard to the assets in question. If among the moneys directed to be transferred to the administrator as representing German enemy assets formerly held by the Palestinian Custodian there would be moneys which in effect belong not to a German enemy, but, say, to a Swiss national residing in Switzerland, there would if the literal wording of the section is being followed be no possibility

¹³ See verbatim Reports of the 20th and 26th Meetings of the First Session of the Trusteeship Council of UNO. Tanganyika Territory Ordinances, No. 26 for 1939, and 24 for 1948. It is certainly doubtful whether the wholesale expropriation of a group of inhabitants of mandated territory is unobjectionable in view of the obligations imposed upon the Mandatory Power.

^{13a} Section 3 (6) deals with property transferred to H.M. Government by a foreign government under international agreements. The same considerations as in respect of section 4 apply.

for the Swiss owner to appeal to the courts in order to obtain a release of his money. One might dislike to draw so startling a conclusion, were it not for the fact that the wording of the section would not seem to leave any doubt. Perhaps this is a draftsman's error. If so, it might be rectified by instructions which the Treasury might give. It is, however, perhaps probable that the problem will not arise in consequence of the present discussions between the British Government and the Government of the State of Israel.

IV

Section 8 of the Act contains four definitions, *i.e.*, those of the conceptions 'German Enemy Debt', 'German Enemy Property', 'Germany' and 'Property'. The definitions are set out in this order, although in fact 'Germany' and 'Property' are terms employed in the explanations of the first two terms, so that they may be said to be more fundamental than the two terms defined first.

The definitions 'Germany' and 'Property' can be treated fairly shortly for the purposes of the present paper. 'Germany' is intended to refer to territory comprised in the German State on the first day of March, 1938. At the first glance the choice of this date is somewhat surprising. In all other post-war agreements the material date for defining Germany is December 31, 1937. This is the date chosen in the Berlin Declaration¹⁴ and in the Rules of Accounting of the Interallied Reparations Agency in order to define the last 'normal' frontiers of Germany.¹⁵ It has—significantly enough—been adopted for the same purpose in the Basic Law of the German Federal Republic.¹⁶ On the other hand, as a matter of historic fact no change in the frontiers of Germany took place between December 31, 1937 and March 1, 1938. The difference would therefore not appear to be of any importance. The definition excludes from the territory of Germany within the meaning of the Act not only territory which both now and in 1937 was Allied territory, such as the Sudetenland and the territory of Poland including the 'Korridor', but also other territory, such as Danzig, the Memelland and, of course, Austria. The Saarland, however, notwithstanding its economic incorporation into France is included.

The definition of 'property' also follows a well-known pattern. With one exception it is identical with the definitions of 'property'

¹⁴ Of June 5, 1945, art. 2 (d), see *Official Gazette of the Control Council for Germany*, Supplement No. I, p. 9, see also the Statement of the same date, *codem loco*, p. 11.

¹⁵ Part 1, subs. (1).

¹⁶ See, *e.g.*, Basic Law, art. 116 (1).

contained in section 7 of the Trading with the Enemy Act and of 'property, rights and interests' in the Orders made under the Peace Treaties with the satellite countries.¹⁷ The Rules of Accounting of the Interallied Reparations Agency do not use the term 'property', but speak of 'assets', a term which is defined in Part I, rule 2 as

'all property, whether movable or immovable, and any right, title or interest in property'.

Although this definition—which is similar to that contained in the Satellite Peace Treaties¹⁸—is much shorter, it is submitted that there is no material difference between the meaning of the terms or the respective definitions. The definition in the Rules of Accounting uses a formula savouring a little more of the Continental legal technique than does that of the Act, but the practical result would appear to be the same. The difference may well be taken to be indicative of the fact that unification of laws does not require, and is not dependent on, identity of the wording of legal enactments.

The one point in which the definition of 'property' in the Act differs from its predecessors in the Trading with the Enemy Act and in the Orders made under the Satellite Peace Treaties is the fact that it includes in the term 'property' money. Money is not contained in the earlier enactments. Here, too, it is submitted that there is no material difference. It is true that the Custodian Order, 1939, treated money payable to an enemy differently from property of enemies and of enemy subjects, the main difference being that money was not payable to the custodian merely because it was payable to an enemy subject, but only if it was payable to an enemy, the term 'enemy subject' being defined on the basis of nationality and the term 'enemy' on that of residence. Perhaps the draftsman of the Act had this distinction in mind and wanted to make sure that money would be included in the definition contained in the Act. If so, he may have contributed to clarifying the meaning for the reader, but he did not add anything to what was already contained in the definitions incorporated into the earlier provisions. There can be no doubt at all that money payable to or held or managed for and on behalf of an enemy is covered by the definition in section 7 of the Trading with the Enemy Act and in the Orders made under the Satellite Peace Treaties.

The Treaty of Versailles and the Orders made under it used neither the term 'property' nor the term 'assets', used by the Interallied Reparations Agency. Nor did they contain a definition

¹⁷ See, e.g., Treaty of Peace (Italy) Order, 1948, s. 1 (1).

¹⁸ See, e.g., Treaty of Peace with Italy, art. 78 (9) (b).

of the German property subject to liquidation. They used the term 'property, rights and interests'. This terminology comes, of course, very near to the wording of the definition of the term 'assets' given in the Rules of Accounting. It is submitted that its meaning is identical with that of the term 'property' in the Act and in the Orders made under the Satellite Peace Treaties and in the Trading with the Enemy Act. All the additional matter inserted into the definition is merely of a clarifying character and adds nothing new. It is perhaps regrettable that a greater consistency of terminology has not been achieved. But the words 'rights and interests' are so wide and all-embracing that there can be little doubt of the identity of meaning of all these various clauses. This identity of meaning has one very important consequence. It means that the interpretation of the terms 'property, rights and interests' adopted by the courts of this country after the last war would appear to be applicable in toto to the new conceptions.¹⁹

After the last war it has been held that the term 'interests' included any form of interest no matter whether this was capable of being used by way of liquidation or otherwise for the benefit of the creditors or for the benefit of anybody else.²⁰ This perhaps somewhat over-literal interpretation would appear to be applicable in the present circumstances. On the other hand, it is submitted, that it must not lead to giving to the term 'interest' a meaning which would subject to the process of liquidation and distribution any asset with which a German has any connection, however loosely defined. This is impossible for two reasons. In the first instance, the measures of liquidation and distribution do not refer to the property to which the interest is attached, but to the interest itself. Thus if a German enemy has a life interest in an estate, but the remaindermen are not German enemies, the life interest only and not the estate are subject to the measures authorised by the Act. In the second instance, the Act is a legal enactment and must therefore be interpreted as referring to interests only which are of legal consequence. The term 'interest' must be taken in this connection to be a term of legal parlance. 'Interest' is, of course, a term also used in the language of social and economic life. But it is not in this sense, that it is used here. If the property of a Swiss child of German parentage has been subject to Custodian control, its German parents are clearly greatly 'interested' in the funds under control, because they may have a claim for maintenance against the child

¹⁹ This has already been rightly pointed out in respect of the Orders made under the Satellite Peace Treaties by Mann, 'Enemy Property and the Peace Treaties', *L.Q.R.*, Vol. 64 (1948), pp. 492 ff. at p. 499.

²⁰ *Re Rush* [1923] 1 Ch. 56.

under Swiss law. But this is not an interest in the property under control which the law could recognise. It is a social, at best an economic, interest and does not justify the liquidation and distribution of the child's property. It would apparently make no difference in this connection whether the claim for maintenance is merely potential or actual: this claim is a matter merely between parent and child and has as such no bearing on the fate of the property.²¹

It is worth noting that the definition of 'property' does not include a mere 'power'. Some cases where a power in respect to property in this country had been granted to a German may be caught by the rule—to be discussed in another connection—according to which property belonging to a body controlled by a German enemy is covered by the Act. But the mere grant of a power in respect of property in this country does not subject the property to treatment under the Act and the power itself does not devolve on the administrator, but was terminated at the beginning of the war. Thus where a neutral firm employed a German traveller in Western Europe and had given power to him to draw on the firm's account with a London bank to the extent of £1,000 per year and the traveller had on September 3, 1939, used this power only to the extent of £600 in that year, the remaining £400 were not payable to the Custodian of Enemy Property and are not covered by the Act. The same would appear to apply, *e.g.*, to an account in a London bank of a neutral ward, whose guardian was a German enemy with full power to operate on the account.

V

Of the remaining two terms 'German enemy debt' and 'German enemy property' the latter is undoubtedly at present of greater interest to practitioners. In fact, at the time of writing there is so much still in the air about the real meaning of 'German enemy debt' that an attempt of dealing with this aspect of the Act would hardly be worth while. Practically everything that is of interest will have to be dealt with in Orders in Council—no doubt a remarkable aspect of the workings of the contemporary legislative machinery.

There is much more that is really definite about the definition of 'German enemy property'. It is true that here, too, some scope is left to supplementation by Orders in Council and that the administrator—as will be shown—has been given a very far-reaching power of excluding assets from treatment under the Act, although

²¹ The conception of 'enemy taint' which plays an important part under the law of the U.S.A. (see Clark, *Att.-Gen. v. Uebersee-Finanzkorporation, A.-G.*, Suppl. 602 (U.S. District Court, District of Columbia, February 21, 1949) is of no importance in English law.

they are fully covered by the definition. But he has—except in one case—no power of extending the circle of assets subject to treatment. It follows that any legal or beneficial owner of property which is at present under control or which is otherwise claimed by the Administrator to be liable to be treated under the Act may apply to the courts for protection of his rights. During the parliamentary discussions of the Act it has been said that the establishment of Mixed Arbitral Tribunals to deal with some of the questions arising out of the administration of the Act would be desirable. It may therefore be pointed out that the liquidation of enemy property within allied territory after the last war was carried out in accordance with the laws of each allied and associated power, and that in this respect the national courts of each power and not the mixed arbitral courts had jurisdiction.²² To this extent therefore, the Act does not represent a change as compared to the practice after the last war. The only difference is that after the last war pre-war enemy debts could only be recovered through the clearing offices established under the Versailles Treaty. Accordingly by Order in Council it was declared to be unlawful to take proceedings in any court for the recovery of any enemy debt recoverable through a Clearing Office.²³ Under the law as in force at present it is open to any British debtor to deny the existence of an enemy debt or the enemy character of a creditor. The Administrator wishing to enforce such a claim has to resort to the ordinary courts as against the debtor. It is significant that very few cases of this type have actually been reported.

In theory it seems that any creditor of a German enemy debt could bring an action in the High Court for a declaration that certain assets, which the Custodian believes not to be enemy assets, are in fact German enemy property within the meaning of the Act. It is clear that creditors might be vitally interested in such a declaration by the courts, because the amount available for the satisfaction of their claims might be materially affected thereby. It is, however, obvious that in practice this right would be of little value to the creditors, because—as has already been mentioned and will be discussed in greater detail in another connection—the administrator has a very far-reaching power of excluding from treatment under the Act any property which he likes to exclude. The creditors would therefore, once the Administrator is resolved not to include certain property within the sphere of the Act, derive no benefit from a favourable decision of the court.

²² Versailles Peace Treaty, art. 197 (b).

²³ Treaty of Peace Order, 1919, art. 1 (III), and see *Re H. A. Nierhaus, an Enemy*, 36 T.L.R. 425; 55 L.J. 134.

The Act stipulates three requirements which 'property' as defined by the Act must comply with in order to constitute 'German enemy property'. These three requirements refer to the legal situation in which the property must be either now or in the future, to the person of the individual or body interested in it, to the relationship in which this individual or body of persons must stand to the property in question. For the sake of abbreviation one may refer to the first of these requirements as the requirement of Custodian control, to the second as to the requirement of enemy holding, and to the third as to the requirement of relationship between the property and the enemy holder. We shall hereafter deal with these three requirements in the order in which they have just been referred to.

VI

The requirement of Custodian control is expressed in the words that the property is

on such a day as may be appointed by an Order in Council made under section 1 of this Act or at any time thereafter becomes subject to control under section 7 of the Trading with the Enemy Act, 1939.

The clause is clearly intended to exclude from the purview of the Act any property which was at any time in the past subject to measures of control, but has since then been released. A further explanation of what is meant by 'subject to control' is contained in section 8 (3) according to which

for the purposes of this Act property which, or the right to transfer which, is vested in any Custodian of enemy property appointed under section 7 of the Trading with the Enemy Act, 1939, and property, which by virtue of any order made under the said section 7, cannot be dealt with without the consent of the Board of Trade, shall be deemed to be subject to control under the said section 7.

It is to be noted that section 8 (3) speaks of property which 'is vested in any custodian' etc. It does not speak of property which is liable to be vested, although it has not been vested. It follows that the mere liability to be placed under control does not render the property subject to treatment under the Act. This is of considerable practical importance. Section 7 of the Trading with the Enemy Act continues to be in force. It is therefore still possible for property liable to be subjected to measures of control under the Act, actually to be so subjected. The powers of seizure under the Act are still in being and may be exercised. But on the other hand there

has been, since the gradual resumption of trade with Germany, a corresponding relaxation of the rules relating to Custodian control. The details cannot be gone into on the present occasion. It may be sufficient to point out that these relaxations have reached their climax with an Order in Council dated March 29, 1949,²⁴ which removed Board of Trade and Custodian control over money and property accruing to persons in Germany under a general authorisation of trade with Germany of the same date and also in respect of certain money and property to which Germans become entitled after the said date in certain ways other than trade. The three other ways in question are wills proved after March 29, intestacies occurring after that date and settlements made after it. The legislative technique of this Order in Council has the usual disadvantages of all casuistic forms of legislation. Although the term 'trade' is very widely defined, it would appear that if a German acquires a claim in tort even after March 29, 1949, the money will in many cases be payable to the Custodian, as *e.g.*, if a German has a claim for damages because of a libel committed by a British resident after the relevant date. In connection with wills it is remarkable that the date on which the will was made is irrelevant. The decisive date is the date on which probate or letters of administration were granted. Although the Order does not expressly say so, one must understand this to mean that the date on which it was proved in the English courts is the relevant date, not the date on which a foreign court granted the foreign equivalent of letters of administration or probate. In the case of testate succession—as distinguished from intestate succession—the date of the death is irrelevant. This may lead to remarkable situations, especially in those cases in which the will is made in the German form and provides for a succession of provisional heirs followed by a final heir. In such cases the provisional heir very often has a much stronger position than a person who, under an English will or settlement, has merely been granted a life interest. He is the—virtually unrestricted—owner of the estate.²⁵ Nevertheless, in cases where the provisional heir or heirs are non-Germans and the final heir a German, the Trading with the Enemy Act will apply, provided the will was proved before March 29, 1949, even if the final heir should not be called on to take the estate earlier than some twenty years or so after March 29, 1949. The Trading with the Enemy Act, 1939, and its restrictions, therefore, look like going to have as good a chance of a very extended

²⁴ SI 1949, No. 605.

²⁵ See German Civil Code, s. 2136 and E.J. Cohn, *Manual of German Law*, Vol. 1 (1950), p. 194.

life as did the Orders made under the Versailles Treaty, which are still in force after over thirty years.²⁶

Section 8 (3) lists three forms of control. These were not the only possible forms. But section 8 (3) must not be taken to contain an exhaustive list. Where property has been dealt with in any other way, it need not on the strength of section 8 (3) be taken not to be included in the term 'German enemy property'. Thus where a business has been subjected to a restriction order under section 3A of the Trading with the Enemy Act, 1939, it would appear that the assets forming part of the said business are to be considered as subject to control.

In practice the requirement of control will, however, presumably cause little difficulty having regard to the sweeping rule contained in section 4 of the Trading with the Enemy (Custodian) Order, 1939, which requires the consent of the Board of Trade to dealings with any property of an enemy. It is, however, important to note that the control must have existed at a date still to be defined. Assuming a German national resided on that date in neutral territory and has since then not returned to Germany, his property would not be subject to control within the meaning of the Act, even though at some former time he may have been residing in Germany so that in addition to being an enemy subject he was an enemy within the meaning of the Custodian Order, with the effect that during the time during which he was so resident, section 4 of the Order applied to his assets in this country. The question which date will be the decisive one is, therefore, of considerable practical importance. It is not a little regrettable that so vital a question is left to be decided by an Order in Council instead of being dealt with by the legislator himself. The unfortunate tendency of allowing the administration to decide even the most fundamental legal problems has perhaps nowhere made itself more strongly felt than in the field of the law relating to trading with the enemy. It has persisted into the present Act, notwithstanding the fact that this Act does not deal with interim measures necessitated by an extraordinary emergency situation, but affects permanently the private property of many persons, including not a few British subjects.

E. J. COHN.^{26a}

(To be continued.)

²⁶ See Lord Simon's motion in the House of Lords on December 13, 1949, *Hansard*, Vol. 135, No. 135, pp. 1489 *et seq.*

^{26a} Of Lincoln's Inn, Barrister-at-Law.

NOTES

RECENT ENGLISH DECISIONS

Contract: Illegal Contract of Loan

The House of Lords has now affirmed the decision of the Court of Appeal in *Boissevain v. Weil*.¹ The decision of the Court of Appeal² has been discussed in the pages of this journal.³ Denning L.J. there expressed his approval of Dr. Cheshire's theory of the proper law of a contract. However, in the House of Lords the case was decided solely on a point of statutory interpretation and without reference to the proper law of the contract under consideration.

The respondent, a British subject, borrowed French francs from the appellant, a Dutch national, in 1944, while both parties were involuntarily resident because of war conditions in Monaco. The respondent drew cheques for the full amount on an English bank, wrote a letter to the bank informing it of the circumstances and instructing it, on presentation or as soon as the law permitted, to honour the cheques in sterling. There were other undertakings given by the respondent to secure payment at the earliest opportunity. The House of Lords unanimously held that the appellant's claim for payment must fail. The transaction was illegal as this act of borrowing foreign currency was expressly prohibited by Defence (Financial) Regulation 2 (1), which, having regard to the Emergency Powers (Defence) Act, 1939, s. 1, operated extra-territorially upon British subjects and applied to the respondent. The case was therefore decided on this point. Lord Radcliffe who delivered the principal speech in the House of Lords expressly denied the relevance of any argument based upon the proper law of the contract⁴:

'I do not find it possible to base my view . . . on the fact, if it be a fact, that the proper law of this contract was the law of England. Indeed, it seems to me an unmaintainable proposition that if a British subject who is within the ban carries out such a transaction in foreign currency as the regulation describes, he commits or does not commit an offence according to whether the proper law of the transaction is English or foreign.'

¹ [1950] 1 All E.R. 728.

² [1949] 1 K.B. 482.

³ Mann, 3 I.L.Q. 70, Morris, 3 I.L.Q. 204.

⁴ [1950] 1 All E.R. at p. 736.

*Extradition : Discretion Under the Fugitive Offenders Act,
1881, s. 10*

*Re Henderson*⁵ is a decision of the Court of Appeal on the discretion vested in a court by the Fugitive Offenders Act, s. 10. That section provides that where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, the court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or make such other order as it deems just.

In this case the applicant, while serving with the Indian Army, was charged in 1944 with offences under the Indian Penal Code. It was alleged that he was involved in a conspiracy which had defrauded the government of large sums of money. While investigations were still proceeding, the applicant was repatriated to England for demobilisation early in 1948. On his failure to return to India for trial, a warrant for his arrest was issued in India, which was endorsed under the Fugitive Offenders Act, 1881, s. 3, by the metropolitan magistrate at Bow Street, and under section 5 of the Act the applicant was committed to prison to await return to India. On an application under section 10 of the Act to the Court of Appeal in its original jurisdiction, the applicant contended that it was no longer possible for him to defend himself properly owing to the delay and the attendant difficulties, and that a fair trial was no longer possible in India as the constitution of the special tribunal set up to try the case had been entirely changed since it was first constituted. The result was that the present members would not see and hear the prosecution witnesses, but would merely read their evidence. For these reasons the applicant submitted that it would be too severe a punishment under section 10 to return him to India for trial.

The Court of Appeal held that this was not a case for the exercise of discretion under section 10. Neither the lapse of time nor the change in the constitution of the tribunal made it impossible for the applicant to obtain justice in India. The consideration which would move the court to exercise its discretion under the

⁵ [1950] 1 All E.R. 283.

section was the possibility of a denial of principles of natural justice. As Tucker L.J. put it⁶:

‘I think that the kind of matters with regard to which this court would act would be where it appears that the contemplated proceedings although perhaps lawful by the law of the country concerned, are really going to be conducted in a way contrary to natural justice or contrary to our ideas of it.’

By way of illustration, the learned Lord Justice observed that if the offence were trivial and the punishment disproportionately heavy, the court might act under the section. But in the instant case, the action of the Indian authorities in applying for extradition was not oppressive.

There is little to comment on in this decision, but it is noteworthy as an authoritative statement of the grounds upon which the court will be prepared to exercise its discretion under this statutory provision.

Immunity of Foreign Sovereigns from Jurisdiction.

The reasons for which the Court of Appeal (Evershed M.R., Somervell and Cohen L. JJ.) has, in *Dollfus Mieg et Compagnie S.A. v. Bank of England*,¹ reversed the decision of Jenkins J. below,² are based on facts which were not all before the trial judge. The facts upon which Jenkins J. had reached his finding for the defendant Bank, were briefly as follows: Sixty-four gold bars were in 1944 looted from a French bank which was then holding them on behalf of the plaintiff company. After the invasion of Germany the bars were recovered by the United States forces and were subsequently deposited in the Bank of England pending ultimate disposal. The deposit was made under orders either of the Tripartite Commission for the Restitution of Monetary Gold, or of the three constituent governments (France, United Kingdom and United States). In an action by the company against the Bank claiming (inter alia) delivery of the bars, and alternatively damages for their conversion, the defendants made application to set aside the writ and stay all further proceedings on the grounds that the bars were in the possession or under the control of the three governments, and that the action was an attempt to sue indirectly the governments concerned, two of which were foreign sovereign States who could not be directly sued.

Jenkins J. found for the defendants on this motion, and the plaintiff company appealed. During the hearing of the appeal,

⁶ At p. 287.

¹ [1950] 1 All E.R. 747.

² [1949] Ch. 369. See also 3 I.L.Q. pp. 78 *et seq.*

it was found that, although as a result of a request made by the depositor governments, the Bank of England had (contrary to its regular practice, which was to credit the customer with the quantity of ounces of fine gold discovered on assay) intended that the bars should be segregated and held as individual bars for the three governments, it had in fact failed fully to implement this intention, and had inadvertently sold thirteen of the bars.

In the light of this new evidence, the Court of Appeal held shortly and unanimously that the sixty-four gold bars were not at any relevant date in the possession or under the control of the three governments, and that therefore the company's action against the bank should be allowed to proceed.

What from a legal point of view are more interesting however, are the pronouncements made by each member of the court on what the legal position would have been, if it was assumed, as was actually the case before the trial judge, that the bars were returnable in specie to the governments on demand. On such facts the majority (Evershed M.R. dissenting) would not have reversed the decision of Jenkins J. These obiter dicta embrace (inter alia) consideration of three possible limitations on the extent of the immunity of foreign sovereigns from jurisdiction.

(1) Evershed M.R. expresses the opinion that 'there is a real distinction, as regards this matter of immunity, between actions in rem and actions in personam'³: in the latter type of proceedings the immunity is limited to cases where the foreign sovereign is actually impleaded, for he would not otherwise be bound by an in personam judgment; admittedly, he might be compelled to resort to the courts to assert his rights, but 'it is no part of the law of immunity, as applied in this country, that the courts will restrain all proceedings merely on the ground that the result might be to compel a sovereign claimant to sue for his rights'⁴

This view is inconsistent⁵ with language used in *Compania Naviera Vascongado v. Cristina S.S.*⁶ and in *Haile Selassie v. Cable & Wireless, Ltd.*⁷ In the latter case Greene M.R. delivering the judgment of the Court of Appeal said: 'if property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the Courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it. The rule

³ *Per* Evershed M.R. at p. 753.

⁴ *Per* Evershed M.R. at p. 757.

⁵ See Somervell L.J. at p. 762; Cohen L.J. at pp. 766-7; Jenkins J. below, [1949] Ch. at p. 384.

⁶ [1938] A.C. 485.

⁷ [1938] Ch. 839.

applies in the case both of actions in personam and of actions in rem'.⁸ Moreover Evershed M.R.'s contention would mean that a foreign sovereign could be called upon to sacrifice his property or his independence. The present Master of the Rolls suggests that the rationale of the immunity is an unwillingness to offend the regal dignity of the sovereign. But an enforced waiver of immunity would be hardly less offensive in this respect than would be the non-existence of the immunity. Nor is it rational that whether or not the sovereign who is not directly impleaded can derive *effective* benefit from the immunity, should depend upon the personal or real nature of the proceedings.

In situations where (as was the case in *Haile Selassie v. Cable & Wireless Ltd.*) the sovereign having no title to, possession of, or control over the property, makes a mere *claim* to it, different considerations apply. In such circumstances the sovereign could in any case establish his claim only by submission to the jurisdiction. Adjudication on the validity of his claim in proceedings in personam to which he is not a party will not therefore prejudice, even indirectly, his position. In these cases—that is cases where although the foreign sovereign is not a party, a mere claim by him is pleaded by one of the parties—the distinction between proceedings in rem and proceedings in personam may be relevant. It might be contended that in the former, as judgment would bind the foreign sovereign, even a mere claim attributed to a foreign sovereign should not be adjudicated upon. But the injustice and inconvenience to which this would lead, would surely prevail over the courts' reluctance to give such offence to the dignity of a foreign sovereign, as is involved in barring a foreign sovereign's claim by an in rem judgment in proceedings to which the sovereign is not a party.

(2) In the judgments in the *Dollfus Case* two differing meanings are attributed to the word 'control' as used by Lord Atkin, when, in the *Cristina Case*, he enunciated the rule that English courts 'will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control'.⁹ Somervell L.J. (with whom Cohen L.J. agrees) says 'Control would . . . cover the right to tell the possessor what is to be done with the property'.¹⁰ Evershed M.R. however expressly rejects the idea that control means the 'right to call for delivery'¹¹: it denotes rather the ability to deal

⁸ At p. 844.

⁹ [1938] A.C. at p. 490.

¹⁰ At p. 760.

¹¹ At p. 758.

with the bars from day to day. It is submitted with respect that here too, the majority view is the better one. It is hardly arguable that the existence of an immunity should, when not based on title, be geared to so technical a concept as common law possession. Control is made an alternative in order to avoid this absurdity, and to preserve the immunity in cases where, for instance, a sovereign as a result of a temporary, and having regard to the nature of the property a perhaps very necessary, bailment has ceased to possess. Control in this context is an alternative to possession, and to interpret it as meaning the element of control associated with possession would defeat its object. In the instant case the majority held that the governments were temporary bailors who had the right to tell the possessor-bailee what to do with the bars, and that they therefore had control of them within the Atkin formula. The finding of Jenkins J. that the governments retained possession is as unnecessary as it was indefensible.¹²

(3) Perhaps the most desirable, and certainly the least arbitrary, limitation on the operation of the immunity of foreign sovereigns from jurisdiction, is the tentative suggestion made by the Court of Appeal, that regard ought to be had to the factor of reciprocity. All the members of the court¹³ appear to favour the incorporation into this branch of the law of a rule to the effect that when a foreign sovereign seeks to stay proceedings the Court should be satisfied by evidence that the law of that country grants immunity on the basis that it is being sought here.

P. B. CARTER.¹⁴

Municipal Courts and the Enforcement of International Agreements

'... an act of State may fix the relations between two States, each of which continues to possess an independent existence. The consequences of such an act of State are entirely beyond the cognizance of municipal courts, because they do not administer treaty obligations between independent States.'¹ But 'it is right of a litigant to assert before the courts of this country, and the duty of those courts to adjudicate upon, claims founded upon a consideration of the municipal law of this country, and not the less so because the law involved has been derived from, and has been enacted for the purpose of giving effect to, certain provisions of a document of an

¹² See 3 I.L.Q. pp. 84-5.

¹³ Evershed M.R. at p. 754; Somervell L.J. at p. 762; Cohen L.J. at p. 767.

¹⁴ Fellow of Wadham College, Oxford.

¹ Per Fletcher Moulton L.J. in *Salaman v. Secretary of State for India* [1906] 1 K.B. 613 at p. 639.

international character.’² It has recently been held by Vaisey J. in *The Republic of Italy v. Hambros Bank Ltd.*³ that rights acquired by the Italian government under a Financial Agreement entered into on April 17, 1947, between that government and the government of the United Kingdom were not cognizable by an English court. Vaisey J. reached this conclusion on the grounds that the relevant portions of the Agreement were, notwithstanding the provisions of the Treaty of Peace (Italy) Order, 1948, made in pursuance of the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947, no part of the municipal law of England. This Act empowered His Majesty to make Orders in Council to give effect to the Treaty of Peace with Italy. Accordingly by the Treaty of Peace (Italy) Order, 1948, it was directed that the provisions of (inter alia) Art. 79 of that Treaty be incorporated (so far as they were by their nature capable of being so) into English law, and that the property, rights and interests therein mentioned should be charged with the claims (including debts) therein mentioned. Art. 79 had provided :

‘ 1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property rights and interests which on the coming into force of the present Treaty are within its territory and belong to Italy or to Italian nationals and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Italy or Italian nationals, including debts, other than claims fully satisfied under other articles of the present Treaty. All Italian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned. 2. The liquidation and disposition of Italian property shall be carried out in accordance with the law of the Allied or Associated Powers concerned. The Italian owner shall have no rights with respect to such property except those which may be given him by that law . . . 6. The property covered by para. 1 of this article shall be deemed to include Italian property which has been subject to control by reason of a state of war existing between Italy and the Allied or Associated Powers having jurisdiction over the property . . . ’

The Order in Council para. 1 (2) contains the proviso that any property, rights, and interests thereby charged ‘ may . . . under the

² *Per Russell J. in Stoeck v. Public Trustee* [1921] 2 Ch. 67 at p. 71.

³ [1950] 1 All E.R. 430: for argument of counsel see 66 T.L.R. p. 468.

direction of the Treasury⁴ . . . be transferred . . . free of any such charge in accordance with the terms of any . . . Agreement with the government of Italy affecting the said property, rights or interests to which His Majesty is or may be a party⁵ . . .’ The Act received the Royal assent on April 29, 1947 : the Order was made on January 26, 1948. The Financial Agreement under which the plaintiff acquired rights provided inter alia for the transfer to the Italian government of liquid assets held as Italian property by the Custodians of Enemy Property, the Italian government to determine the exact method of disposal of non-liquid property.

A private fortune of ex-King Victor Emmanuel III of Italy was within the ambit of this Agreement. On March 10, 1949, the Custodian of Enemy Property acted with regard to the property in a way which the plaintiffs alleged was inconsistent with their rights under the Treaty.

Vaisey J.’s reasons for holding that the effect of the Treaty of Peace (Italy) Order, 1948, was not to make the relevant part of the Agreement part of English municipal law are three.⁶ 1. The words of the Order (quoted *supra*) are permissive not obligatory. 2. The Agreement was not specifically mentioned. 3. There is no authority or principle which ordains that what is in effect a treaty ‘can be imported into and incorporated in our domestic law by a mere vague allusion, when there would have been no difficulty at all in doing so expressly and when an obvious opportunity for doing so presented itself.’⁷

Direct authority on the interpretation of statutes which purport to incorporate into the municipal law unspecified international agreements, is scanty. In *Re Californian Fig Syrup Company’s Trade Mark*⁸ Stirling J. would have been prepared to hold that the effect of section 103 of the Patents, Designs and Trade Marks Act, 1883, was to incorporate into English municipal law, the adherence in 1884 by Great Britain to the International Convention for the Protection of Industrial Property. The relevant words of that section read : ‘If Her Majesty is pleased to make any arrangement with the government or governments of any foreign state or states for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design or trade mark in any such state, shall be entitled

⁴ It is perplexing that no mention is made in the reports of any Treasury directive either having been made, or not having been made, in connection with the Financial Agreement.

⁵ [1948] SI No. 117, para. 1 (2).

⁶ At p. 433.

⁷ At p. 433.

⁸ (1888) 40 Ch. D. 620.

to a patent for his invention or to registration of his design or trade mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the protection obtained in such foreign state.' The wording of this section is obligatory as the word used is 'shall'; in the Order which Vaisey J. was called upon to interpret the word used is 'may'. But undue significance should not be attributed to the permissive form of that proviso. It would appear that the only substantial effect that can be given to the permissive nature of the wording must be one of three alternatives: either (a) that whether or not a particular agreement is within the ambit of the proviso is a matter of interpretation of the proviso or (b) that an agreement may be incorporated into municipal law by a further Order or (c) that whether or not a particular agreement to which the Order is *prima facie* applicable is to become incorporated into municipal law shall depend upon some sort of discretion.

Either of the first two alternatives would render the whole proviso unnecessary. If the proviso is permissive in the third sense, it is a little surprising that there is not some more clear indication of the existence of the discretion than the mere use of the word 'may'. Moreover it is difficult to imagine what factors should influence the exercise of such a discretion, or why it was silently exercised against incorporation of the Financial Agreement in the instant case.

The use of the word 'may' perhaps denotes no more than grammatical correspondence with its use in the phrase 'to which Her Majesty is or may be a party. . .'. In section 103 of the Patents, etc. Act, 1883, the word 'is' is used in the corresponding context: 'if Her Majesty is pleased.'

Section 103 may more clearly refer to the accession by the British government in 1884 to the International Convention of 1883, than does para. 1 (2) to the Financial Agreement. The fact that the Financial Agreement was in existence at the time the Order was made and could therefore have been specified, whereas the adherence of the British government to the International Convention was not until after the 1883 Act, would support this contention. But this support is weakened by the use of the word '*is*⁹ or may be' in the Order.

The decision in *The Republic of Italy v. Hambros Bank, Ltd.*, turns on the construction of a particular Order.¹⁰ Its importance as

⁹ Italics supplied.

¹⁰ Vaisey J. points out, however, that even if he had found for the plaintiff on this point, he would have doubted whether the terms of the Financial Agreement could be enforced as between the parties before him. This view appears to confuse the contractual nature of a treaty when regarded as an international

a precedent must therefore be limited. So far as this case itself is concerned, one may respectfully suggest that although specific reference could have been, but was not, made to the Financial Agreement under which the plaintiff claimed, the words of para. 1 (2) of the Order could have been regarded as constituting something more than a 'vague allusion' to this Agreement. The prevailing positivist approach to law inevitably restricts the enforcement of international law in municipal courts to cases of incorporation by consent, express or implied. Enforcement, serving as it does, to emphasise the legal nature of international law and to bring 'into prominence the fact that the obligations of international law are, in the last resort, addressed to individual human beings'¹¹ should not be further limited, either in cases where consent is implied by reluctance to imply it, or in cases where it is express by illiberal construction of statutory instruments.

P. B. CARTER.

THE MATRIMONIAL CAUSES (WAR MARRIAGES) (APPOINTED DAY) ORDER, 1950

This Order (SI No. 672 of 1950) fixes June 1, 1950, as the appointed day under the Matrimonial Causes (War Marriages) Act, 1944. That Act provided that the High Court should have divorce and nullity jurisdiction in the case of a marriage celebrated on or after September 3, 1939, but before the appointed day in cases where the husband was, at the time of the marriage, domiciled outside the United Kingdom and the wife was, immediately before the marriage, domiciled in England. It was further provided that the Act should not apply if the parties to the marriage had resided together for any period of time in the country of the husband's domicile at the time of such residence. The appointed day also marked the beginning of a period of five years after which no proceedings could be commenced under the Act. Similar provisions were made for Scotland in the Act.

As the conditions which gave rise to the Act have largely disappeared—these were the presence of large numbers of allied servicemen in England during the war—June 1, 1950, has been appointed as the date before which a marriage must be celebrated to come within the terms of the Act. Moreover, in the case of marriages celebrated within the appropriate time limits, proceedings

agreement between States, with the legislative nature of an incorporating statute.

¹¹ Oppenheim, *International Law*, 7th ed., Vol. 1, pp. 41-2.

for matrimonial relief as provided by the Act must be instituted within five years after June 1, 1950.

The Law Reform (Miscellaneous Provisions) Act, 1949, sections 1 (4) and 2 (4) provide a choice of law rule in cases in which jurisdiction is assumed under the Act of 1944. It follows, from what has already been said, that these particular provisions of the Act of 1949 will become a dead letter on and after June 1, 1955. So far as sections 1 (4) and 2 (4) provide a choice of law rule for cases falling within the Matrimonial Causes Act, 1937, section 13 and the Act of 1949, they will, of course, continue to have operative effect after the appointed day.

THE RECOGNITION OF COMMUNIST CHINA

Civil Air Transport Inc. v. Chennault and Others (1950)¹

The decision of Gibson C.J. in the Supreme Court of Hong Kong in *Civil Air Transport Inc. v. Chennault and Others* (1950) is the first concerning the status of the Central People's Government of China.

The plaintiff company, Civil Air Transport Incorporated, was a United States corporation, and sued the defendants for assets in Hong Kong belonging originally to a Chinese corporation known as the China National Aviation Corporation. It was alleged that these assets, which included a number of aircraft, had been sold on December 12, 1949, to the defendants, and by them to the plaintiffs on or about December 18, 1949. The claim was for delivery of the assets and damages for wrongful detention. The defendants issued a third-party notice to sixteen Chinese claiming to be indemnified by them in respect of the claim of the plaintiff corporation to damages on the ground that these third parties had prevented the defendants from delivering the assets to the plaintiff corporation.

The China National Aviation Corporation was incorporated in China as a civilian aviation enterprise in July, 1947. Eighty per cent. of its shares belonged to the Chinese Ministry of Communications, and the remaining 20 per cent. to Pan-American Airways. Of the nine directors seven were appointed by the Ministry and the others by Pan-American Airways. During October, 1949, after the proclamation of the Communist Central People's Government as the Government of China, and the purported dismissal by that Government of the former Nationalist Ministers, a number of the aircraft and much of the equipment belonging to the Corporation was moved to Hong Kong for safety.

¹ Supreme Court of Hong Kong, Original Jurisdiction, Action No. 5 of 1950 (text of judgment made available through the courtesy of the Clerk of the Court).

Most of the Corporation's employees in Hong Kong were sympathetic to the new régime and refused to recognise the authority of the directors who were nominees of the Nationalist Government and Pan-American Airways. The Nationalist Government grounded the aircraft by cancelling their certificates of registration and interim injunctions were obtained restraining the removal of the Corporation's assets from Hong Kong.

In December, 1949, the defendants wrote to the Nationalist Ministry of Communications offering to buy all the assets of the China National Aviation Corporation and of the China Aviation Transport Corporation. The latter was an unincorporated body which operated an air line as a department of the Nationalist Government. The defendants also offered to purchase the shares held by the Nationalist Government. This offer was accepted on behalf of the Nationalist Government which was then at Formosa. The defendants then purported to sell the assets of the two Corporations to the plaintiff Corporation.

The Central People's Government had already, in November, 1949, appointed seven new directors and instructed the new managing director to take over the assets and employ them for the transport of passengers, mail and cargo by air. At the same time the China National Aviation Corporation was declared to be the property of the Central People's Government and under its control.

The third parties objected to the appointment of a receiver on the ground that it would violate the sovereign immunity of the People's Government. Gibson C.J. considered himself free to consider this plea even though the Central People's Government was not a party to the suit, for 'sovereign immunity does not seem to me to be a privilege which must be claimed before the courts will take notice of it, but rather a rule of law of which the courts must take notice if the appropriate facts come to its knowledge unless there has been submission to the jurisdiction'.² The learned Chief Justice therefore submitted a questionnaire to His Majesty's Government, which sent the following reply:

'(1) H.M. Government in the U.K. does not recognise Nationalist Government (Republic Government) as *de jure* Government of Republic of China.

'(2) Up to and including midnight January 5/January 6, 1950, H.M. Government recognised Nationalist Government as being *de jure* Government of Republic of China, and as from midnight

² Cf. *Taylor v. Barclay* (1828) 2 Sim. 213, 220: 'I conceive it is the duty of the judge in every court to take notice of the public matters which affect the government of the country', *per* Shadwell V.-C. See also Lyons, 'The Conclusiveness of the Foreign Office Certificate', 23 B.Y.I.L. 1946, p. 240 *et seq.*

January 5/January 6, 1950, H.M. Government ceased to recognise former Nationalist Government as being de jure Government of Republic of China.

‘ (3) As from midnight of January 5/January 6, 1950, H.M. Government recognised Central People’s Government as de jure Government of Republic of China.

‘ (4) H.M. Government recognise Nationalist Government has ceased to be de facto Government of Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from dates on which it ceased to be in effective control of those parts.

‘ (5) H.M. Government does not recognise any governments other than Central People’s Government of People’s Republic of China as de facto Government of Republic of China. Attention, however, is invited to the second sentence in answer to question (4).

‘ (6) In 1943 Formosa was a part of the territories of Japanese Empire and H.M. Government consider Formosa is still de jure part of that territory. On December 1, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-Shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to Republic of China.³ On July 26, 1945, at Potsdam, the heads of the Government of United States of America, the United Kingdom and Republic of China reaffirmed “The terms of Cairo Declaration shall be carried out”.⁴ On October 25, 1945, as a result of an order issued on the basis of consultation and agreement between Allied Powers concerned, Japanese forces in Formosa surrendered to Chiang Kai-Shek. Thereupon with the consent of the Allied Power Administration, Formosa was undertaken by the Government of Republic of China. At present, actual administration of the island is by Wu Kuo Cheng, who has not, so far as H.M. Government are aware, repudiated superior authority of Nationalist Government.

‘ I am advised that the effect of recognition by H.M. Government as stated in answer to questions (1) to (5), and in particular its retroactive effect, if any, are questions for court to decide in the light of those answers and of evidence before it’.

In the light of this statement Gibson C.J. then proceeded to examine whether the Central People’s Government had become the owner of the assets by some form of compulsory acquisition recognised by the court. In his opinion a nationalisation decree would have no effect on property in Hong Kong, and he held therefore

³ *The Times*, December 2, 1943.

⁴ *United Nations Documents, 1941-1945, 1946*, pp. 206-7.

that the claim to immunity based on the ownership of the assets by the Central People's Government failed. Applying the principles of *The Cristina*,⁵ the learned Chief Justice decided that the Central People's Government was in de facto possession of the assets, and he considered that action taken by that Government since the act of recognition rendered it unnecessary for him to consider the retro-active character of the recognition. He did, however, say that 'On any view as to the effect of the law of recognition of foreign governments, it would, I think, have to be conceded that the Central People's Government's title to the 80 per cent. of the shares of the Nationalist Government would relate back at least to the date on which it became the de facto government of the area where the shares were transferable'.

In view of the statement made on behalf of the Foreign Office, Gibson C.J. decided that to allow the appointment of a receiver would be an infringement of the sovereignty of the Central People's Government which had been duly recognised by His Majesty's Government. The appeal of the defendants against this finding was rejected in May, 1950.

Perhaps of far greater importance than the actual facts and judgment in this case was the statement of the Foreign Office with regard to Formosa. Sir Leslie Gibson had asked 'What is the status of Formosa? Is Formosa part of China or is it foreign territory *vis-à-vis* China?' As we have seen, the answer of the Foreign Office was that Formosa was still part of Japan, though under the administration of a Chinese who, apparently, still recognised the authority of the Nationalist Government.

This statement raises curious complications. It is the opinion of His Majesty's Government that the Nationalist authorities no longer exist as the de facto or de jure Government of any part of the territories of the Republic of China. That being so, it is a little surprising to find a reference in the answer to question (6) to the 'superior authority of the Nationalist Government', for one would have imagined that if the administration of Formosa 'was undertaken by the Government of Republic of China', the attitude of His Majesty's Government would have been either that this administration was now to be exercised by the new Government of the Republic, or that it had reverted to the Supreme Commander for the Allied Powers in his capacity as the representative of the Allied Powers in Japan.

The attitude of His Majesty's Government in this connection is different from its attitude towards Korea, which, under the same

⁵ [1938] A.C. 485.

declarations, was removed from Japan and has now become independent. Further, it has never been suggested that the Soviet Union is wrongly in occupation of Sakhalin in accordance with the terms of the Yalta Declaration, February 11, 1945.⁶ Similarly, there was no protest when General MacArthur declared that 'so far as the Riu-kiu Islands were concerned they did not fall into the jurisdiction of international control, being entirely subject to the direction of the United States'.⁷ This statement was made in reply to a Soviet assertion that the situation in the Riu-kiu Islands was subject to the jurisdiction of the Allied Council for Japan established in accordance with the Moscow Declaration, December 27, 1945,⁸ to advise the Supreme Commander with regard to the occupation and control of Japan. At no time has it ever been suggested that questions concerning Formosa came within the purview of the Allied Council. Perhaps the best comment that can be made with regard to the British statement concerning Formosa is that made by Mr. Dean Acheson at a Press Conference held before the Central People's Government had been recognised by Great Britain. He said 'that the island of Formosa should be regarded as part of the territory of China. It was not necessary to wait for a peace treaty before handing Formosa over to China. . . . Whatever sort of China was recognised Formosa should be regarded as part of it'.⁸ He described the suggestion that Formosa might still be regarded as technically part of the occupied territory of Japan as a 'lawyer's quibble'. It is submitted that it is not even a 'lawyer's quibble', for such an attitude completely ignores the nature of the various inter-Allied Declarations that are relevant, and forgets the frequency with which His Majesty's Government has invoked Potsdam as a binding agreement when criticising Soviet activities in Germany.

L. C. GREEN.⁹

HUMAN RIGHTS AND COLOUR DISCRIMINATION

Sei Fujii v. The State of California (1950) *Los Angeles Daily Journal*, April 25, 1950

By the California Alien Land Law, 1920, no alien who is ineligible to acquire United States citizenship is able to acquire, use, possess or in any way enjoy real property, or interests therein, in the State

⁶ *Occupation of Japan, Policy and Progress*, Dept. of State Publication 2671, Far Eastern Series 17.

⁷ *Op. cit.*, n. 4, p. 257.

⁸ *The Times*, January 6, 1950.

⁹ Lecturer in International Law, University College, London

of California. Any real property acquired in violation of this principle escheats to the State.

Sei Fujii was born in Japan in 1882, but had resided in the United States, save for an interval of one year, permanently since 1903. In July, 1948, he purchased the property which was the subject of this action. In the court of first instance the judge found for the State and Fujii appealed to the District Court of Appeal. In his appeal Fujii alleged that the Alien Land Law violated the equal protection of the law provisions of the United States Constitution; that it arbitrarily discriminated against him solely because of his race; that classification on the sole ground of race was arbitrary and irrational; that this legislation was contrary to the Californian Constitution; and that it violated the declared purposes and spirit of the United Nations Charter.

Justice Wilson, in whose judgment Presiding Justice Moore and Justice McComb concurred, found little difficulty in holding the legislation compatible with the Constitutions of both the State and the United States. He cited a long line of decisions to this effect, including one in which the Supreme Court of the United States had upheld Washington legislation of the same character. He pointed out that if the matter had rested solely on the compatibility of the Alien Land Law with the Constitution, he would have been bound by precedent to uphold its validity.

The learned judge contended, however, that there was 'an authority more potent than the Constitution of the State, an authority which for want of opportunity has not previously been made the basis of a judicial determination of the question before us'. The authority to which Justice Wilson referred was the Charter of the United Nations which had in fact been invoked in connection with racial restrictive covenants before the Supreme Court of New York County in *Kemp v. Rubin* ((1947) 69 N.Y.S. 2d. 680).

Having placed the case on the level of the United Nations Charter the learned judge proceeded to consider the purpose of the Alien Land Law. He pointed out that in 1920 when the legislation was enacted there were large numbers of aliens who, under the United States nationality legislation, were ineligible for citizenship. In the thirty years since 1920, however, this legislation has been liberalised and today, with rare exceptions, only Japanese nationals are so barred. Since there has been no immigration of Japanese since 1941, Justice Wilson regarded the legislation as discriminatory against an ever-decreasing group of a particular nationality and colour. He then drew attention to the provisions of the Charter of the United Nations with regard to human rights.

As a treaty ratified by the United States, 'the Charter has become the "supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding" (U.S. Const., Art. VI, Sec. 2). The position of this country in the family of nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the Charter according to its plain language, and its unmistakable purpose and intent'.

The portions of the Charter cited by the court as relevant were the Preamble, Articles 1, 2, 55 and 56, which in the paragraphs that are relevant, do no more than provide for the promotion and encouragement of respect for human rights. Nowhere in the Charter is there any hint as to what these human rights are, nor is there any suggestion that these lofty sentiments are sufficient to overcome the independence of members in respect to matters which are essentially within their domestic jurisdiction (Art. 2, para. 7). In *Kemp v. Rubin*, in fact, when the Charter was invoked as a treaty which invalidated racial restrictive covenants, the court said it had 'nothing to do with domestic matters. . . . In fact, Article 2, section 7, of the United Nations Charter . . . expressly so provides'. Justice Wilson, however, made no reference either to this case or to Article 2, paragraph 7 of the Charter, despite the fact that it would be difficult to think of a matter which could be more essentially within the domestic jurisdiction than the rules concerning the holding of real property.

Not only did Justice Wilson cite the United Nations Charter. He also quoted that part of President Truman's address to Congress urging the ratification of the Charter in which he said that 'it seeks to achieve universal respect for, and observance of, human rights and fundamental freedoms for all men and women without distinction as to race, language or religion'. When similar statements were cited by Mackay J. in *Re Drummond Wren* ([1945] 4 D.L.R. 674) in the High Court of Ontario he made it quite clear that he regarded them, and the Canadian acceptance of the Charter, as indicative of Canadian public policy. After referring to the President's comments, the learned judge turned his attention to the Universal Declaration of Human Rights. Of this unenforceable and non-binding document he cited Articles 1, 2 and 17. The latter states that 'everyone has the right to own property . . .', and he said that 'this Declaration implements and emphasises the purposes and aims of the United Nations and its Charter'. No one would quarrel with the use of the word 'emphasises', but it is hardly logical to regard a pious 'Declaration' of this nature

as 'implementing' anything. This use of the Declaration reminds one of the attitude of the Nuremberg Tribunal to the unratified Geneva Protocol, which was considered as evidence of the criminality of aggressive war.

These citations led the court to the conclusion that 'a perusal of the Charter renders it manifest that such restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter. . . . It is incompatible with Article 17 of the Declaration of Human Rights. . . . Such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every State in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority'.

Having come to this conclusion, the court held that the law was 'untenable and unenforceable', and allowed the appeal.

It is submitted that though this decision might be ethically right, it is legally wrong. In so far as it rests on the Declaration of Human Rights it is based on a document which is not a treaty, and therefore cannot abrogate an existing law. In so far as it rests on the Charter, it misinterprets the clauses with reference to human rights and completely overlooks the importance and significance of Article 2, paragraph 7. Unless the decision is overruled by the Supreme Court of California or of the United States it must, however, stand as good law. It is, of course, possible that for reasons of policy, not unconnected with the present cold war, the State of California will decide, or be advised, not to appeal. It would, however, be a great pity to allow the decision to stand merely by default. †

The reasons that make it vital to see the fallacies of the court in this case are not far too seek. There are at present too many people who acclaim the Charter as the last word on human rights, while others have no hesitation in pretending that the Declaration guarantees specific rights to all, despite the clearest statements to the contrary by responsible spokesmen. Until now they have been unable to quote *Kemp v. Rubin* in their support, for, as we have seen, the court in that case regarded the Charter as having no effect on internal land legislation. As to *Shelley v. Kraemer* (1948) 334 U.S. 1, in which the Supreme Court refused to enforce a racial restrictive covenant, the Charter was not even mentioned in the judgment which depended solely on the Constitution of the United States. These neo-naturalists have been compelled, therefore, to rely on *Re Drummond Wren* which only used the Charter as evidence of Canadian public policy. Now, however, they have a decision which expressly abrogates municipal law because it is

considered as inconsistent with the Charter. What the court has really done is to abrogate the wrong law. It is not really the Alien Land Law which is inconsistent with the Charter, but the United States nationality legislation which introduces the discrimination that the court disliked so much. Nationality legislation, however, is federal and could not be abrogated by a State court.

A survey of the decision and the logic of the reasoning leads one to the conclusion that if it is cited as evidence of the enforcement of respect for human rights, those who cite it and the case they make, must indeed be hard up for supporting material *de lege lata*.

L. C. GREEN.

RECENT AUSTRALIAN DECISIONS ON PRIVATE INTERNATIONAL LAW

1

The disparity in the official value of the English and Australian currencies, contrasted with the identity of the units of denomination, has long been destined as a fertile soil for litigation in respect of contractual obligations expressed in pounds of unspecified denotation. It is perhaps surprising that the controversial elements arising from this situation have, but for the decisions to be noted presently, attracted relatively few judicial pronouncements in the past. The older authorities are principally the decisions of the House of Lords in the *Adelaide Electricity Co. Case* [1934] A.C. 122 and of the Privy Council in *Payne v. Deputy Commissioner of Taxation* [1936] A.C. 497, the *Auckland Corporation Case* [1937] A.C. 589 and *De Bueger v. Ballantyne* [1938] A.C. 452. None of these can be regarded as having provided a final solution in view of the conflicting reasons for judgment on certain vital matters in the *Adelaide Electricity Co. Case*, and the ensuing doubts which the subsequent decisions have not succeeded in resolving. Translated into bare legal propositions, their effect may be reduced to this summary:

(1) The distinction is firmly established between money of account, *i.e.*, the currency in which an obligation is expressed, and the money of payment, *i.e.*, the currency with which the obligation is to be discharged.

(2) The former is of the substance of the obligation and therefore to be determined in accordance with the 'proper law' as a matter of interpretation. In so far as Lord Wright's judgment in the *Adelaide Electricity Co. Case* and certain of his observations in the

Auckland Case suggest that money of account relates to the mode of performance and is governed by the *lex loci solutionis*, this must be discountenanced because it is both at variance with correct analysis and inconsistent with the majority view of the House in the principal case. (Cf. Mann, *Legal Aspect of Money*, pp. 173-179.)

(3) If the proper law of the obligation is English and the parties have failed expressly to indicate their choice, the currency of the place of payment is, *prima facie*, *semble* determinative.

(4) The money of payment which furnishes the means or instrument for discharging the debt affects the mode of performing the contract and is governed by the *lex loci solutionis*.

(5) There has been a diversity of judicial opinion on the crucial question whether the £A and £E are common moneys of account. In the *Adelaide Electricity Co. Case* Lords Warrington, Tomlin and Russell decided this issue, as in 1921 or 1931 (?), affirmatively, Lord Wright emphatically in the negative, while Lord Atkin without expressing a final opinion inclined to the view that the respective currencies were separate, at any rate after the abandonment of the Gold Standard. In the majority view, therefore, the question, in a contest between the English and Australian pound, was, and perhaps still is, one of the mode of performance governed by the *lex loci solutionis*: see Lord Wright's estimate of the principal decision in the *Auckland Case* at p. 606 and in the *Mount Albert Case* [1938] A.C. 224, 241. *Payne v. Deputy Commissioner*, in which, be it noted, the opinion was delivered by Lord Russell, seems to have proceeded on the assumption that it was no longer possible to treat the respective currencies as identical, but the judgment of the Board did not reflect a conscious departure from the earlier decision, and may perhaps be distinguishable as resting on the interpretation of an Australian taxing statute. The later cases did not advance the solution of this controversy the importance of which barely requires emphasis since in a case where the proper law and the *lex loci solutionis* are not identical and the presumption noted in (3) *supra* is inapplicable (and short of acceptance of Lord Wright's isolated proposition stated in (2) *supra*) the decision will be vitally affected by the choice of one or the other of these alternatives.

It is suggested that the decisions of the High Court of Australia in *Bonython v. Commonwealth* (1948) 75 C.L.R. 589, *Goldsborough Mort & Co. v. Hall* [1949] Argus L.R. 235 and *Adelaide Electricity Co. v. Commissioner of Taxation* [1949] Argus L.R. 641, have made a substantial contribution towards clarification of the problems involved in this situation and merit the approbation of the Privy Council when the viewpoint adopted there will be finally tested in

the first of these three cases on an appeal for which special leave has recently been granted. The judgments proceeded upon the following basic principles:

(i) Fortified by the reflection that the majority view in the *Adelaide Electricity Co. Case* was confined to the monetary position existing prior to 1932 and advertent to slight indications of departure from that standpoint in relation to the position after that date as discernible in the subsequent Privy Council decisions, Fullagar J. in the *Goldsborough Case* [1948] V.L.R. 145 concluded that it was no longer possible to identify the two currencies as common money of account. This view also commended itself to the High Court in *Bonython v. Commonwealth* and, in the words of Dixon J. on the most recent occasion, 'has ceased to be open to doubt': [1949] A.L.R. at p. 644. The independent legislative authority, combined with its unquestionable exercise and the ensuing disparity in exchange value, have created a separate Australian currency as money of account, despite the fact which was critically adverted to by Lord Tomlin in 1934 that it may be difficult to predicate with exactness when this divergence actually occurred. Starke J. alone has repeatedly taken the view that the *Adelaide Electricity Co. Case* precluded this assumption without, however, succeeding to advance a cogent argument in defence of a proposition which, in view of the realities of the financial position, is exceedingly difficult to sustain. Its inadequacy is underlined by the dilemma of finding a solution in a case where the obligation is expressed in pounds but payment is required in a third country. This situation actually arose in the *Goldsborough Case* where one of the stockholders was resident in Switzerland. To say in these circumstances that 'as to payment in other currencies the measure of value would be the unit or money of account common to England and Australia' is, with respect, virtually meaningless since it fails to provide a working test for ascertaining the measure of obligation in practical terms.

(ii) The problem in these cases, therefore, being as to the money of account and not the money of payment, must be resolved in accordance with the 'proper law' of the obligation as a matter of construction. The contract may, of course, contain an explicit provision indicating the choice of the parties as in *De Bueger v. Ballantyne* where in a contract made in 1932 and containing substantial English elements payment in New Zealand for services to be rendered there was expressed in pounds 'sterling'. It is worthy of mention, however, that both in *Maudsley v. Colonial Life Assurance Co.* [1945] V.L.R. 161 and in *Bonython v. Commonwealth* (Latham C.J. dissenting) Australian courts have decided

that the presence of the word 'sterling' in a contract made prior to the time when the respective currencies separated is not conclusively indicative that English money of account was designated. The facts of the first of these cases barely justifies a doubt as to the correctness of the conclusion since the relevant assurance contract between an Australian and an American company would have rendered the implication of a reference to English currency capricious. In the second case, the question related to debentures originally issued by the Government of Queensland and subsequently converted into Commonwealth stock which contained no primary English factors other than that payment on redemption could be demanded, inter alia, in London on exercise of an option as to the place of payment within a certain time limit which had not been observed. Dixon J.'s impressive explanation of the neutral significance of the word 'sterling' is difficult to controvert, though without doubt the majority decision on this point will constitute one of the principal questions in the forthcoming appeal.

(iii) The presumption that the money of account which is intended is that of the place of payment is never conclusive and of little, if any, value in a variety of cases, e.g., (a) where the place of payment is not expressly fixed. To let in the additional common law presumption in favour of the creditor's residence approximates a search for 'ignotum per ignotius': per Fullagar J. in the *Goldsborough Case* at p. 152; (b) where, at the time of making the contract, there was only one money of account and no subsequent change was envisaged; (c) where the place of payment was left to the choice of one of the parties, since it is highly improbable that the intention was to enable that party unilaterally to determine the measure of the obligation. Such options usually purport to serve the convenience of the payee and are directed solely to the place and money of payment, not to a different quantification of the substance of the obligation: per Dixon J. in *Bonython v. Commonwealth* at p. 623, Fullagar J. in the *Goldsborough Case* at p. 155. The seemingly contrary decision in the *Auckland Corporation Case* must be regarded as having depended entirely on the construction of the relevant trust deed (see also *Mann, op. cit.*, p. 179 for a well-merited criticism of that decision); (d) where the place of payment is in a third country having an altogether different monetary denomination: see the case of the Swiss stockholder in the *Goldsborough Case*.

(iv) In all cases the question involves a process of construction in which the relevance of the above-mentioned presumption should, of course, be given its due weight. The task of interpretation is particularly difficult in cases where circumstances have arisen which

were not contemplated at the date of contract. As Latham C.J. pointed out in the last-mentioned case, the appropriate test cannot be the inquiry, familiar in frustration cases, what the parties would have said if they had anticipated a difference in the relative value of the two currencies, because the answer must be speculative. In Dixon J.'s view propounded in *Bonython v. Commonwealth* at pp. 624-5 and now generally accepted by the High Court, where an expression is used capable of referring to either of two moneys of account which at the time of the contract belong to different monetary systems, the *actual* intention of the parties can presumably be ascertained as a matter of inference, but where there is a subsequent divergence no actual intention existed so that the point must be to which of the two the obligation 'belongs'. In such a case, the nature and circumstances of the transaction supply the grounds from which an 'implication' must be deduced. Applying Lord Watson's formula in *Dahl v. Nelson* (1881) 6 A.C. 38, 59 the meaning of the contract must be ascertained by what 'the parties, as fair and reasonable men, would have agreed upon', if they had adverted to the possibility of a future divergence.

The contest between English and Australian factors inevitably led to some difficulty in selecting the proper implication in these cases, particularly in *Goldsborough Mort & Co. v. Hall*. An analysis, however, of this aspect of the decisions would, by reason of their complexity, transcend the purpose of the present comment and must be left to the critical study of the individual reader.

2

The paucity of case law respecting marital property relations in the conflict of laws justifies reference to any decision, however modest its implications and effect. In *Ochsberg v. Commissioner of Stamp Duties* (1949) 49 S.R.(N.S.W.) 249 the estate of a person who had died intestate in South Africa included Australian Treasury Bonds in the custody of the Commonwealth Bank in New South Wales. The defendant made an assessment of death duty on the footing that the deceased had been entitled to the whole beneficial interest in the securities, but this assumption was contested by the personal representatives who instituted the present action to recover death duty paid in respect of the widow's portion, claiming that on his death she had become entitled to receive a moiety of what, in consequence of the marriage, had been a joint estate. It was held that, by reason of the deceased's domicile in Cape Colony at the time of his marriage, a 'community of property' had arisen between the spouses, analogous in effect to the French provisions at issue in *De Nicols v. Curlier* [1900] A.C. 21. Since, therefore, the

bonds which had been acquired subsequently to the marriage were caught by the *implied contract* imposed by Roman-Dutch law, it was further argued that the wife's moiety was immune from taxation. The Full Court, however, accepted the Commissioner's contention that in the terms of section 2 (c) (i) of the Stamp Duties Act, 1900 (N.S.W.), an interest in the bonds had been reserved 'by implication to the deceased for his life', as it appeared that by the relevant legal system, failing an application by the wife for *separatio bonorum* in case of prodigality, the husband enjoyed the power of administering and utilising the whole of the joint estate in any way he thought fit for the benefit of himself, his wife and family. It suffices to commend the lucid analysis of the South African conception of community of property which the court succeeded in extracting in the absence of foreign expert evidence, from the somewhat inadequate data contained in the plaintiff's admissions.

J. G. FLEMING.¹

RECENT CANADIAN DECISIONS ON PRIVATE INTERNATIONAL LAW

Readers will recall the group of Canadian cases noted in (1948) 2 I.L.Q. 686-692. Two of these, *Spencer v. Ladd* [1948] 1 D.L.R. 39 and *Gower v. Starrett* [1948] 2 D.L.R. 853, have aroused much speculation as to what will ultimately be decided as the bases of jurisdiction in actions for the annulment of marriage. In the former an Alberta trial judge had followed the English decision of *White v. White*, [1937] P. 111, in a void marriage case. In the latter, a British Columbia trial judge, in a void marriage case had said, not only for himself but for all his colleagues on the trial bench with whom he had consulted prior to delivery of judgment, that there was no difference between a void and voidable marriage for purposes of annulment jurisdiction and that this jurisdiction was to be based upon the three rules set out in Dicey's Rule 65. No new developments have occurred in the Canadian courts. However, the decisions of the English Court of Appeal, to which very great respect is paid in Canada, cast serious doubts upon the future of the British Columbia decision. *De Reneville v. De Reneville* [1948] 1 All E.R. 56 has made it clear that in voidable marriages, Dicey's oft-quoted three-fold rule is not applicable. In *Casey v. Casey* [1949] 2 All E.R. 110 the same English court further ruled that the place of celebration of the marriage was not a basis for jurisdiction in a voidable marriage, subject possibly to problems of form. [Serious question might be raised as to whether in the other matter

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discussed in the case—choice of law assuming the court had jurisdiction—the court correctly viewed Canadian law. In so far as Canadian law was not proved, it could be assumed by an English court that the Canadian law provided for annulment on the ground of wilful refusal to consummate. It is very doubtful if it does. The British Columbia Court of Appeal in *Wilkinson v. Wilkinson*, April 11, 1950, has just held, by majority, that it does not.] In the light of these two English decisions, and in the light of Canadian practice to follow the English Court of Appeal, it appears that, for better or worse, the complication which Bateson J. introduced into English law by way of the difference for jurisdictional purposes between void and voidable marriages and which British Columbia had done its best to avoid for Canada, is here to stay until the various courts of last resort get the problem. At that level it might be interesting to see if the court decides that, provided the proper choice of law is made, the problem of jurisdiction is not a serious one—is not one as to what court shall deal with a problem of the marriage contract or status, but rather one as to what courts can, consistently with fair opportunity to the defendant to present his defence, apply the appropriate law. Does it matter whether in *Casey v. Casey* the English court had ‘jurisdiction’ in some technical sense for matrimonial causes if it were applying the same law as any Canadian court would apply, assuming that the parties were domiciled in that case in a Canadian province or territory and that the English and Canadian courts would apply the law of that province or territory?

Another Canadian case noted earlier, *ibid.*, at pp. 691–2, has been affirmed by the Supreme Court of Canada. In *Minister of National Revenue v. Fitzgerald* [1949] 3 D.L.R. 497; S.C.R. 453, there had been a question whether Canadian federal succession duty was leviable in respect of the estates of two persons dying, after the date upon which the legislation came into force, domiciled in the state of California where the chief asset of each of the estates consisted in a share of an estate of one, B. S., who also had died domiciled in California (but before the effective date), and whose estate consisted of a share in an estate of a person dying domiciled in Canada. In the course of the discussion as to the nature of the interest taken by successive estates in California, the court commented upon the nature of the property passing from one California estate to the next—a right to have the preceding estate administered—and this property had a *situs*, not in Canada where the money ultimately coming to the last estate was presently deposited in a Canadian bank, but in California where B. S. died domiciled. Some question was raised by the fact that an ancillary grant had been

made to W., a Vancouver lawyer, in British Columbia in the B. S. estate and that the sum of \$150,000 with interest was now ready to be paid out by W. The court, as did the trial court, speaks of 'the duty' of the ancillary administrator to remit to the domiciliary administrator. Cf. Kerwin J. at pp. 500-1; Rand J. at p. 504; Kellock J. at pp. 508-9 (D.L.R.). No mention is made of the possibility that the court might permit the ancillary administrator to pay directly to the beneficiaries of the foreign estate as in *Re Lorillard* [1922] 2 Ch. 638 (C.A.); cf. *Dicey*, 6th ed., at p. 815. The members of the court assume that what Dicey calls the ancillary representative's 'only safe course' in the absence of a court order is his *duty*. The dissent of Locke J. did not deal with this point.

The most interesting conflicts case to come before the Canadian court recently is the decision of Farris C.J.S.C. in *Walker v. Walker* [1950] 2 D.L.R. 90, in the Supreme Court of British Columbia. The decision is now (April) upon the list of appeals before the Court of Appeal. Mrs. Walker sued her husband for judicial separation. The husband's defence was that 'prior to the ceremony of marriage between himself and the petitioner, the petitioner had been lawfully married to Richard Schnell Johnson domiciled in the State of California', that Johnson was still living and that the earlier marriage had never been lawfully dissolved or annulled. Walker asked for a declaration that the marriage solemnised between the petitioner and himself be declared a nullity. While Johnson was domiciled in California (he was in gaol there), his wife visited Reno in the State of Nevada for the requisite six weeks at the end of which time she obtained a divorce from Johnson from whom she had first obtained an 'appearance and waiver'. This document provided that when Mrs. Johnson filed a complaint for an absolute divorce in Nevada this document would constitute an appearance, 'and that the undersigned does hereby submit himself to the jurisdiction of the' Nevada court. The document also provided a waiver by Johnson of all time to plead, a consent that his default may be noted and the case may be set down for trial at the convenience of the court, and a waiver of service of all notices and process required by law to be served. Mrs. Johnson obtained the decree on December 31, 1946. Less than two years later she married Walker in Vancouver, British Columbia, where Walker was domiciled. Walker now contended that California, the admitted domicile of the Johnsons at the time of the Nevada decree, would not recognise the decree and that therefore the decree was not valid in British Columbia because the decree was granted neither by the court of the domicile nor by a court whose judgment would be

recognised by the domicile : *Armitage v. Att.-Gen.* [1906] P. 135. Farris C.J.S.C. rejected the contention, finding that California, and therefore British Columbia, would recognise the Nevada decree. For Canadians, this problem (based on the *Armitage Case*) is complicated by the 'full faith and credit' clause of the constitution of the United States. Recent interpretations by the Supreme Court of United States have emphasised 'participation'. In *Sherrer v. Sherrer* (1948) 334 U.S. 343, the court held that the State of Massachusetts must recognise a Florida ninety-day divorce decree where the husband defendant was present in person and by counsel at the trial and did not question the jurisdiction—i.e., the ninety-day residence. He had had 'his day in court with respect to every issue involved in the litigation including the jurisdictional issue of petitioner's domicile' (p. 348). So, too, the same State was obliged in *Coe v. Coe* (1948) 334 U.S. 378, to recognise a Nevada six-weeks divorce decree where the wife defendant appeared personally and by counsel, filed a cross-complaint for divorce, admitted the husband's residence and participated personally in the proceedings. On the other hand, in *Rice v. Rice* (1949) 336 U.S. 674, the court held that the State of Connecticut need not recognise a Nevada six-weeks divorce decree where the wife defendant had not 'in any way participated in the Nevada proceedings'. The majority (5-4) opinion states that 'no personal service was made upon respondent', but in his dissenting opinion Jackson J. says (p. 676) : 'The complaint and process were handed to Lilian at her home in Connecticut. She was not served with process in Nevada. She . . . did not appear personally or by attorney in the action'. In our case (*Johnson*), the husband could not appear personally—he was in gaol. He did not appear by counsel. All he did was to waive, in advance of proceedings, all his rights to defend, notice, delays, jurisdiction. Was this a sufficient degree of participation to come within the *Sherrer* doctrine? And what is the *Sherrer* doctrine? Does it amount to anything more than a form of estoppel? If not, does it apply only to those persons who were parties to the Nevada decree? Or does it also bind Walker who married the former Mrs. Johnson? And does Walker's knowledge that Mrs. Johnson had a 'Reno divorce' alter his position in any way?

Farris C.J.S.C. relied upon the California case of *Heuer v. Heuer*, 201 P. (2d.) 385, where an appellate court held that California must recognise on the facts of that case a Nevada six-weeks decree. This was the law of California and his lordship could not go behind that decision. The decision had been presented to him by a California lawyer called to give evidence upon the law of that State.

Presumably in the absence of any evidence as to the foreign law (California), such law would be, on English conflict rules, presumed to be the same as the law of British Columbia, which clearly says that the Nevada decree, on its own merits, was not valid in British Columbia because the parties were not domiciled there when the decree was obtained. The witness from California endeavoured to show that the *Heuer Case* differed from the Johnson decree, and the witness gave it as his opinion that if the Johnson decree was attacked in the California courts it would not be recognised 'as on the evidence of the petitioner as given in this [B.C.] court, she was not a bona fide resident of Reno, Nevada, for the time required under the laws of Nevada to establish residence entitling her to a divorce'. The judgment does not state in what particulars the residence was not bona fide. Had there been a valid six weeks bona fide residence, California would have, according to the witness, recognised the decree. But his lordship refused to find any distinction: it was not for him to say what the California courts would do if the Johnson decree were questioned there; *Heuer v. Heuer* was law until the California courts distinguished it. That decision, relying upon the *Sherrer* decision, declared that 'it is sufficient if the defendant has participated in the proceedings and had full opportunity to litigate the issue. If so, the decree is binding even though a relitigation of the question of jurisdictional residence requirements in another State might result in a finding that the domiciliary claim was fraudulently asserted for the purpose of obtaining a decree, which as a matter of policy could not be obtained in the State of the domicile'. His lordship could find no difference, for 'participation' purposes, in a written waiver and appearance which took place in this case, and the personal appearance described in the *Sherrer* decision. In fact, Farris C.J.S.C. held that, even apart from the *Heuer* decision, the Nevada decree 'is a valid decree according to the laws of the State of California and so remains . . . until such decree has been attacked in the courts of California, and in this particular case on a question of fact only namely whether the petitioner testified falsely with the fraudulent intent of deceiving the Nevada court as to residence'. But the only evidence as to California law, and some evidence was needed to rebut the presumption under which the decree would have otherwise been held to be invalid, was from the expert California lawyer who testified that California will recognise Nevada decrees only where there was bona fide residence. And there was not such residence here according to the witness. In effect the witness said that this decree would not be recognised in California. Farris C.J.S.C. refused, in effect, to accept this view; he would accept the witness' evidence in part

only—the general, but not the particular. With respect, we are tempted to ask whether an English or Canadian judge before whom a conflict question arises is entitled to accept part and reject the balance of the testimony with respect to foreign law. It is true that this is a question of fact, but there is no suggestion that the court disbelieved the expert. His lordship merely said that he would not inquire into the jurisdictional fact of bona fide residence in the original court. Farris C.J.S.C. says: ‘Surely, I could not be asked, particularly when I have not the evidence given in the Nevada court before me, to determine what a California judge would find with all the evidence before him on a matter of fact’. It may be that it is not for us to go behind a foreign judgment, as a general rule, in order to determine whether or not we are prepared to recognise it. But where it is a case of foreign recognition (California), and there is evidence that the foreign law’s recognition depends upon the integrity of the evidence in the original proceedings (Nevada), and there is also evidence that because of an absence of bona fides the foreign law would not, in this particular case, recognise the decree, are we entitled to say that we must take the foreign (Nevada) decree at its face value and not go behind it? To do so would, it is submitted, be to distort the foreign law. We might just as well not have admitted evidence of it at all.

In the *Walker Case*, his lordship does not raise the issue as to whether a stranger to the original proceedings, Walker, is bound by them. If the only basis for holding that Johnson is bound is estoppel, does that basis run against third parties? In two of the three cases in the United States highest court, the *Sherrer* and *Coe Cases*, the original parties to the first proceeding were also the parties to the second in their home State. In the third (*Rice*), where the Nevada decree was held bad, the two ‘wives’ were parties to administration proceedings with respect to the estate of the husband Rice who had remarried in Nevada after his decree there. But in view of the invalidity of the decree, even as between the original parties, the point as to third parties did not arise.

Farris C.J.S.C. refers to the anomaly that would result if he held the Nevada decree bad by California law, and the subsequent Vancouver marriage of Walker therefore bad by British Columbia law, yet Johnson could have validly remarried in California, his domicile. But it is submitted that this ‘anomaly’ in fact does not exist: it presupposes the validity in California of the Nevada decree. If that decree were valid, British Columbia and England would also recognise it: *Armitage Case*. But had the ‘anomaly’ existed, is it so serious a matter? Either of the Johnsons could have remarried without any question in Nevada, yet such marriage would be

open to serious question elsewhere, assuming domicile outside that State at the time of the Nevada decree.

In the result, it will be interesting to see whether the appellate court in *Walker v. Walker* touches upon the two chief problems mentioned above: (a) how far may a judge refuse to accept the evidence of the foreign law; and (b) does the estoppel, if such it is, bind third parties?

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NOTES ON SOUTH AFRICAN PRIVATE INTERNATIONAL LAW

Attachment ad Fundandam Jurisdictionem

IN South African law attachment of property of a *peregrinus* in the Union founds jurisdiction of a division of the Supreme Court in an action where a judgment sounding in money is claimed, with the proviso that if the plaintiff (applicant) is a *peregrinus* in the area to which the court belongs, in addition to such attachment the cause of action must have arisen in the court's area, or the contract in respect of which action is brought must have been entered into within the court's area (Pollak, *The South African Law of Jurisdiction*, pp. 57-8). The courts allow attachment of exiguous amounts of money and articles of very small value to found jurisdiction in actions where large sums are claimed. (See Maasdorp J.P. in *Ex p. Smith, re Estate Main* [1912] C.P.D. 45 at 50.) A recent case, however, shows that the attachment must not be illusory. In *Ferguson and Timpson, Ltd. v. African Industrial and Technical Services (Pty.), Ltd.* [1949] 4 S.A.L.R. 340 (W.L.D.), plaintiff (respondent in the proceedings), on ceasing to act as agent of the defendant, a peregrine company, had purchased from defendant, and paid for, certain plant which up to then he had been stocking as defendant's agent. Some time thereafter plaintiff repudiated the contract and claimed return of the purchase price, on the ground of a breach of warranty. In order to found jurisdiction, it attached a debt, of a lesser amount than the purchase price claimed, which it was common cause that it owed defendant. Defendant applied to set the attachment aside, and the order was granted. If plaintiff succeeded in the main action, then, under the South African law of set-off, the debt attached would have been consumed *ipso jure* and retrospectively to the date when the parties were first reciprocally liable to each other. 'The object of the action', said Clayden J. at 343, 'is to prove the very facts

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which will show that set-off did operate; success in the action will involve the decision that there was no asset of the defendant which could be attached'.

A Question of Characterisation

'English law', says Dr. J. H. C. Morris in the Sixth Edition of *Dicey* (p. 71), 'is relatively rich in cases raising questions of characterisation, but poor in judicial discussion of the problem'. South African law would appear to be relatively poor in cases raising questions of characterisation, and completely destitute in judicial discussion of the problem. Where questions of characterisation do arise (as, for instance, in the complex case of *Westminster Bank, N.O. v. Zinn, N.O.* [1938] A.D. 57), they are overlooked, the judges characterising without (seemingly) being aware that they are doing so. (It is appreciated that this phenomenon is not confined to the Union of South Africa.) The approach of the court in the latest decision, *Anderson v. The Master* [1949] 4 S.A.L.R. 660 (E.D.L.D.), is no different from that of South African courts in the past.

The facts in *Anderson's Case* are curiously reminiscent of those in the celebrated Maltese marriage case, *Anton v. Bartholo* (1889), which first led Bartin to consider the problem of characterisation.

H and W were married without antenuptial contract in Scotland in 1923, both being domiciled there at the time. In 1926 they came to South Africa and acquired a domicile in the Cape Province. In 1948 H died, still domiciled in the Cape Province. He left no part of his estate—consisting entirely of movables (apparently) all situate in South Africa—to W. W claimed that she acquired 'proprietary rights' in H's estate by virtue of the *jus relictæ* of Scots law, being the law of H's domicile at the time of the marriage.

Reynolds J. held that according to South African rules and choice of law, the proprietary consequences of the marriage were to be determined by the present law of Scotland as to the proprietary consequences of a marriage celebrated in 1923. The subsequent change of domicile to the Cape Province did not affect the position, for there was a clear line of South African authority upholding the 'immutability' doctrine relating to property rights of spouses. But W's rights were only those 'which by the laws of Scotland as existing in 1923 she acquired as rights in such fashion that that law recognises them as proprietary rights acquired by her on marriage, and not affected according to that law by a change of the testator's domicile away from

Scotland. . . . The validity of her claim and the amount of it can only be determined according to the law of Scotland'.

Elsewhere the learned judge referred to the '*jus relictæ* or . . . any other . . . property right she may have acquired by the law of Scotland', and ruled that 'any "property rights" obtained by applicant by the marriage in 1923 must be determined according to the law of Scotland'.

In the event no final decision was given, since W had failed to prove Scots law. She was afforded an opportunity to produce such proof.

The approach of the court would appear to square with that of Dr. Martin Wolff (*Private International Law*, 1945, pp. 155-6), who would reframe the rule 'The effect of marriage on the property of the spouses is governed by the law of their first matrimonial domicile', to read thus: 'If two persons are married to each other the court has to apply all those rules operative at their first matrimonial domicile which according to the law there prevailing regulate the effects of marriage on the property of spouses'.

The result so far (despite the court's failure to realise that it was characterising) may seem to comply with the canons of convenience and equity. At the next stage, however, the application of the *lex causae*, the *renvoi*, with its attendant difficulties might emerge. If (as it might be) Scots law does not recognise the immutability doctrine of the marital regime, and would apply the law of the Cape Province to property acquired by the spouses whilst situate in that province, would our judges give effect to this rule of Scots Conflict of Laws? To do so would be to fly in the face of our own immutability doctrine.

It is apparent that in *Anderson v. The Master* the court did not consider this possibility. The case raises many interesting questions which it is not proposed to canvass at this stage, save to say that in the writer's view it would be instructive to see how the law of the Cape Province could be applied to the factual situation, without producing the familiar *circulus inextricabilis*.

It is to be hoped that if *Anderson's Case* comes before the courts again, some consideration will be paid to the problems of characterisation and *renvoi* it appears to involve.

The Law Governing the Proprietary Consequences of Marriage

In view of the support given by several English and American writers to the view that the proprietary consequences of marriage are (or should be) governed by the law of the intended matrimonial home (Story, *Conflict of Laws*, 8th ed., paras. 191-9, Nelson,

Private International Law, 1899, pp. 106-7, Westlake, *Private International Law*, 7th ed., para. 36, Cheshire, *Private International Law*, 3rd ed., pp. 651-2, and Dicey, *Conflict of Laws*, in the third and earlier editions) and the absence of English and American decisions directly in point, the judgment of the full bench of the Appellate Division of the Supreme Court of South Africa in *Frankel's Estate v. The Master* [1950] 1 S.A.L.R. 220, should be of more than purely local interest.

Frankel's Case is one of those rare examples of a set of facts bringing crisply into issue a vexed problem, without introducing any extraneous matters allowing the case to go off on a side issue.

H and W were married in 1933 in Czechoslovakia, H then being domiciled in Germany (his domicile of origin) and W, immediately before her marriage, in Czechoslovakia. At the date of the marriage the parties intended to and had determined and agreed to leave Europe and establish a permanent home in Johannesburg, Transvaal Province, South Africa, where H had been promised employment. The parties arrived in Johannesburg four months after their marriage, both having the intention of settling in the city permanently. After remaining four years in Johannesburg, H was appointed director of his employer's firm in Durban, Province of Natal, South Africa. As a result H and W removed to Durban with the intention of settling there permanently. H was naturalised as a British subject in 1938. The parties lived in Durban until 1948, when H died. The marriage was without antenuptial contract. The law of Germany is that a marriage without antenuptial contract is out of community of property.

These were the facts alleged by W, who asked for a declaratory order that her marriage was in community of property according to the laws of South Africa. Since the court was called on to decide an exception to her declaration, all the above allegations were, for the purposes of the decision, deemed to be true. In South African (domestic) law, marriage is in community of property, unless there has been an antenuptial contract excluding such community, with the proviso that in Natal a post-nuptial contract is also permitted to exclude it.

Whether the property left by H was movable or immovable or both, and where it was situate, does not appear from the report. This, however, does not complicate the issue, for immovables and movables in South African law are treated alike in questions of the proprietary consequences of marriage (*Chirwell v. Carlyon*, 14 S.C. 63).

Now there have been many South African decisions holding

that where by the law of H's domicile at the time of the marriage the marriage is out of community of property, then it remains so notwithstanding any change of domicile thereafter. Up to *Frankel's Case*, however, the question had not arisen whether, if the law of the intended matrimonial home differed from that of the husband's domicile at the time of marriage, the former or the latter governed the reciprocal property rights of the spouses. It had always been considered, however, that there was a good deal of Roman-Dutch authority in favour of the application of the law of the intended matrimonial home.

The Roman-Dutch authorities were thoroughly canvassed in *Frankel's Case*. Many of them state that where the would-be spouses are domiciled in different countries before marriage and intend to settle after the marriage in the country of the wife's domicile, they are taken to have tacitly agreed that their matrimonial regime shall be governed by the law of that country. Three of the learned judges of appeal were content to dismiss all these exceptional cases on the ground that the man married the woman in the latter's country of domicile, and that it might fairly be said that at the time of marriage he too had acquired a domicile there *animo et facto*. Counsel for W argued that a number of the examples given by the old authorities certainly could not be explained away in this fashion, for the man had clearly not acquired the woman's domicile at the time of marriage. To the present writer it would seem that his submission was justified. Moreover, why was this type of marriage mentioned as an exception to the rule of the *lex domicilii* of the husband, if in law it was no exception? Van den Heever J.A., alone of the appellate judges, attempted to give the answer to the riddle. To his mind it was significant that no Roman-Dutch writer cited a case where the parties intended to acquire a home in a country other than the domicile of either of them at the time of marriage. In a learned analysis of the influence of the Roman notion of the conclusion of marriage by overt act of induction into the husband's home, on Roman-Dutch and civilian writers in formulating their rules, he concluded that 'the parties could not be deemed to have assumed a matrimonial home by mere intentions and could not assume any such home other than that of either the husband or the wife'.

All five judges of appeal rejected the view that the law of the intended matrimonial home governed by virtue of an implied agreement of the spouses. 'It is the law', said Centlivres J.A., 'which induces the resulting incidents of the matrimonial regime and not the unexpressed or assumed wishes of the contracting parties'. Once the fictional agreement theory was rejected, the views of

Pothier, Burge, Story, the early Dicey, Westlake and Cheshire fell to the ground. 'None of them seems to realise that the proprietary rights of spouses are determined by operation of law in the absence of an antenuptial agreement.' Watermeyer C.J. could find no more reason that the parties agreed on the law of their intended home, which might be entirely unfamiliar to them, than on the law of some other country more familiar to them. Schreiner J.A. was not convinced that the *ratio* of the *lex domicilii* rule was that the husband's domicile was most likely to be the *situs* of the parties' home after the marriage; and even if it was the reason, there was no need to provide exceptions to its operation. It was pointed out by Van den Heever J.A., that since South African law has alternative matrimonial regimes, there was no cause to imply that the spouses agreed on community of property when, if agreement were postulated, its effect as a rule would be to exclude community.

The court rejected, too, the analogy put forward by counsel for W between the effect of an ordinary contract, governed according to Roman-Dutch writers by the *lex loci solutionis*, and marriage, the effect of which, it was suggested, should be governed by the law of the intended matrimonial home, as the law of the place of performance. Firstly, said Van den Heever J.A., it was sounder to say that marriage was a juristic act *sui generis*, than a contract. Secondly, it might not be possible to say where the *locus solutionis* of a marriage was. What if the parties in the case under review had decided after two weeks to leave South Africa?

Lastly, the court *a quo* and three of the judges of appeal (Watermeyer C.J. and Greenberg and Schreiner JJ.A.) rejected the application of the law of the intended matrimonial home on the ground of its inconvenience. In the Natal Provincial Division, the court of first instance, Broome J. (whose reasons the chief justice adopted in his judgment in the appeal), pointed out the desirability of certainty in the property rights of spouses. If the *lex domicilii* of the husband were to govern, then these rights would be 'easily capable of ascertainment'. (This, it is submitted, is an overstatement and the present writer would adopt the view of Schreiner J.A. that although proof of domicile might be difficult in certain cases, yet it would always be simple compared with proof of the intended matrimonial home, since domicile can be proved by external circumstances such as birth and conduct.) If the law of the intended matrimonial domicile of the spouses were to govern, 'it will be a secret locked in their own breasts'. Fraud on creditors and on the taxing authorities would be possible. A surviving spouse could fraudulently claim that the parties intended at the time of marriage

to acquire a home in some country, the application of whose law would enable such spouse to escape death duties which would be imposed if the *lex domicilii* were to govern. The object of the application by W in this very case was so to avoid such duties, but the court expressly stated that it made no reflection against her that she was acting fraudulently. Again, how soon must the intention to go to the intended matrimonial home be carried into effect? What of unforeseen delay, or if the intention is not carried into effect at all? And if it is carried into effect, what law governs in the interim? Schreiner J.A. was concerned with the nature of the intention to acquire a home in the new country—how firm and definite an intention was required—must it be to remain there permanently, whatever happens? The spouses themselves in certain cases would not be able to say what law governed the proprietary consequences of their marriage if the suggested rule were adopted, particularly if one spouse had different views from the other as to the desirability or urgency of moving.

One of the submissions of counsel for W was not expressly considered. He contended that, because of the technical rules of domicile, to apply the *lex domicilii* of the husband might mean applying the law of a country which was not his actual home. This submission is, of course, impliedly rejected by Schreiner J.A., who is not at all convinced that the basis of the *lex domicilii* rule is that the husband's domicile will normally be the actual home of the spouses. Applied to the judgment of Van den Heever J.A., however, counsel's argument would seem weightier: for the learned judge of appeal invokes Roman law notions of the physical induction of the bride into the groom's actual home to explain the *lex domicilii* rule, and offers no explanation of the cases where the domicile of the husband is not his actual home. Possibly the best answer is that of Broome J. who accepts the theory that the basis of the *lex domicilii* principle is that the husband's domicile is normally the matrimonial home:

'Many principles of our law have a similar basis in that they are founded upon the facts which exist in the majority of cases. There is no reason in logic why the minority of cases, where the facts do not exist, should be bound; that they are bound is part of the tribute which logic pays to certainty. The result is that the law is sometimes hard, but the alternative is that it should be slippery.'

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FOREIGN JUDGMENTS: COMPETENCE OF COURT PRONOUNCING
ORIGINAL JUDGMENT

One way of impugning the validity of a foreign judgment in an English court is to question the jurisdiction of the foreign court pronouncing the judgment. But a difficult question arises at the outset, whether for purposes of private international law a court has jurisdiction; if it is a court of a country some of whose courts (but not necessarily the court concerned) have jurisdiction over the matter—such a court is called by Dicey ‘a court of competent jurisdiction’—or whether a court has jurisdiction only if also the internal law of the relevant country gives it jurisdiction; such a court is called by Dicey ‘a proper court’.

In the fifth edition of *Dicey's Conflict of Laws*, Rule 104 ends with the words ‘The validity of a foreign judgment is not necessarily affected by the fact that the court which pronounces it is not a proper court’. These words have been omitted from the corresponding Rule (Rule 77) in the sixth edition. The authorities on which the words are stated to be founded in the fifth edition are *Vanquelin v. Bouard* (1863) 15 C.B.(N.S.) 341 and *Doglioni v. Crispin* (1866) L.R. 1 H.L. 301. The latter case does not afford much assistance. The former is examined critically by the editor of the sixth edition who submits that a close examination of the case shows that the plea that the French court whose judgment was being impugned was not a proper court was negatived.

Both these editions of *Dicey* freely admit that in actions *in rem* the weight of authority is in favour of the view that the foreign court can only have jurisdiction if it is a proper court. The two editions diverge in their views on an action *in personam*. It is the object of this note to question the view of the editor of the sixth edition that in actions *in personam* the foreign court must also be a proper court. If this view is correct an English court may well be asked to prefer the evidence of an expert witness in foreign law as to that law to a decision of the foreign court itself on the same point which has been given on the precise facts in proceedings *in personam* between the identical parties. It is suggested that an English court ought not to be asked to do this. The position may be different if the question of jurisdiction passes *sub silentio* in the foreign court.

Some light is thrown on the problem by the recent decision of the Judicial Committee of the Privy Council in the case of *Brijlal Ramjidas v. Gordhandas Seksaria* (1947) L.R. 74 Ind.App. 203. This case which came before the Board on an appeal from Bombay, arose out of a partnership carried on in Indore and

elsewhere, the partnership deed containing an arbitration clause. A dispute between the partners was submitted to arbitration in Indore, and the arbitrator ruled that the plaintiffs (in the Bombay action) should purchase the defendants' interest in the partnership thus in effect dissolving the partnership between plaintiffs and defendants. At this point the plaintiffs began the Bombay action for a declaration that the award was invalid and consequential relief. Meanwhile, the arbitrator in Indore took steps to file his award with the Indore court in accordance with Indore law. The plaintiffs filed objections to the filing of the award, which were in due course considered and rejected by the High Court in Indore. The defendants in the Bombay action thereupon set up this decision of the Indore High Court as an answer to the action in Bombay, relying on the provision of section 13 of the Indian Code of Civil Procedure, which provides (subject to exceptions) that 'a foreign judgment shall be conclusive as to any matter thereby adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title'. The plaintiffs relied on several of the exceptions to the above, including the exception applying when the judgment 'has not been pronounced by a court of competent jurisdiction'. It was argued that by Indore law the High Court had no jurisdiction to deal with a question of the filing of an award, and that it should have been dealt with by the district court. The Board (without determining whether this argument was right or not) dealt with this point in their judgment (delivered by Lord du Parcq) as follows (at p. 207) :—

'It was contended that the transfer of the proceedings initiated before the district judge to the High Court of Indore was an erroneous exercise of the High Court's powers, and that the High Court was not "a court of competent jurisdiction". This argument was disposed of satisfactorily by both Mr. Justice Chagla and the appellate court, who rightly pointed out that the question whether a foreign court is the proper court to deal with a particular matter according to the law of the foreign country is a question for the courts of that country. There is no doubt that some court in Indore was a "court of competent jurisdiction". It was for the High Court in Indore to interpret its own law and rules of procedure, and its decision that the High Court was the "proper" court must be regarded as conclusive. It may be added that the appellants [plaintiffs] appear to have consented to the transfer of the proceedings from the district judge's court to the High Court'.

This statement, which clearly adopts *Dicey's* phraseology 'court of competent jurisdiction' and 'proper court', supports the view

of the fifth edition of *Dicey* against the sixth. But it is instructive to turn to the judgments of Chagla J. and the appellate court in Bombay which are commended by the Judicial Committee. These will be found reported in [1943] I.L.R.(Bombay) 366. The report of Chagla J.'s judgment is greatly abridged but it shows (at p. 369) that the judge adopted the view of *Vanquelin v. Bouard*, *supra*, expressed in the sixth edition of *Dicey*, viz., that the court in that case held that the French court concerned had jurisdiction to deal with the matter of the action. The judgment of the appellate court expresses the matter differently and in a manner more consistent with the fifth edition of *Dicey*, Beaumont C.J. (at p. 379) stating the matter as follows:—

‘What the law of Indore is is a question of fact, and the case of *Vanquelin v. Bouard*, *supra*, shows that where a foreign tribunal has decided the question of fact necessary to determine the jurisdiction of a particular foreign court, it is not open to an English court to go behind that decision’.

This Indian case is, of course, founded on the construction of an Indian Act, which may differ from the judge-made English law. In any case it is difficult to extract any clear principle from it. It is suggested, however, that it does support the view that an English court will not accept the evidence of an expert against the positive decision of a foreign court as to its own law in an action *in personam* between the same parties. It is further suggested that no discussion of the problem can be complete without a reference to the case.

J. G. MONROE.⁹

CONVENTION ON DECLARATION OF DEATH OF MISSING PERSONS

The necessity for a solution of the legal difficulties arising from the disappearance due to events of war or persecution of persons, whose death cannot be proved, was recognised by the preparatory Commission for the International Refugee Organisation in 1948. The question was considered by the Economic and Social Council at its Seventh and Eighth Sessions and it established an Ad Hoc Committee composed of representatives of Brazil, Denmark, France, Lebanon, Poland, the United States and the Soviet Union which met in Geneva from June 7 to 21, 1949, and prepared a draft convention. The Economic and Social Council sent a report of the Ad Hoc Committee to the General Assembly¹ which

⁹ Of the Middle Temple, Barrister-at-Law.

¹ Resolution 369 (iv) of December 3, 1949.

decided at its Fourth Session to convene an international conference to prepare a convention on the basis of the Ad Hoc Committee's report. The Secretary-General on December 19, 1949, issued invitations to all member Governments to attend the conference, which was the first international conference to be called by the General Assembly. This conference met² at Lake Success from March 15 to April 6, 1950, and prepared and signed 'a Convention on the Declaration of Death of Missing Persons'.

The Convention seeks to establish a uniform procedure for obtaining declarations of death, which will avoid a number of present difficulties, if adopted at least by those countries in which the relatives of missing persons now largely find themselves. It will be, for the purpose of these Notes, sufficient to give short explanatory comments on the substantive Articles:

Article 1. Certain limitations are imposed upon the class of missing persons, in respect of whom declarations of death may be issued. The missing person must, first, have been resident³ in Europe, Asia or Africa; second, have disappeared between 1939 and 1945 under circumstances affording reasonable ground to infer that they have died in consequence of events of war or of racial, religious, political or national persecution'. There are no such limitations upon a presumption of death in English law.

The Article also makes provision for extension by two or more of the Contracting States, as between themselves, of the Convention to persons who have 'disappeared subsequently to 1945 under similar circumstances'.

Article 2. Tribunals⁴ which are to be competent to receive applications and to issue declarations of death, are

- (i) the tribunal of the place of the last domicile of the missing person or of his last voluntary or involuntary residence;
- (ii) the tribunal, in the country of which the missing person was a national, competent under applicable domestic law or, in its absence, the tribunal of the capital of that country;
- (iii) the tribunal of the place of the situs of property of the missing person;

² The Governments of the following States were represented: Belgium, Bolivia, Brazil, Burma, China, Cuba, Denmark, Ecuador, France, Greece, India, Israel, Netherlands, Nicaragua, Pakistan, Peru, Philippines, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia. The following States sent observers: Canada, Egypt, Ethiopia, Iran, Mexico, Thailand.

³ However, service in armed forces in those continents is not itself to constitute residence.

⁴ That is to say, 'All authorities empowered *ratione materiae* to determine the fact of death under the governing domestic law': Article 2 (1).

- (iv) the tribunal of the place of decease of the missing person ;
- (v) the tribunal of the place of domicile or residence of the applicant in the case of an application filed by any of the following relatives, ascendants, descendants, adopted children and their issue, brothers and sisters and their issue, uncles, aunts, or spouse.

Provision is made in paragraph 3 for the designation by a Contracting State; if it so desires, of one or more tribunals to assume competence for the whole of the national territory; this provision is designed in particular for the United States, with its complex system of Federal and State courts. The competence of some of the tribunals enumerated, for example (ii), (iv) and (v) in this Article would not, of course, be recognised in English law in the absence of legislation.

Article 3. In paragraph 1 the conditions, which must be satisfied in order that a declaration of death be issued, are set out. They repeat in part, for the sake of clarity and completeness, the provisions of Article 1. The requirement that five years must have elapsed 'since the last known date on which the missing person was probably alive' is admittedly almost unnecessary in view of the limitation of time imposed by Article 1 and Article 3 (1) (i), and its insertion was opposed by a number of delegates to the conferences. Similarly, the requirement of public notice is largely otiose but was included with an eye upon American law and particularly the law of New York State.⁵

Paragraph 2 sets out the possible classes of applicant for a declaration of death :—

- (i) persons who may be entitled to, or have an interest, other than that of a creditor, in any part of the missing person's estate under a will or intestacy ;
- (ii) persons who may be entitled to, or have an interest, other than that of a creditor, in any property the devolution or distribution of which may depend either on the survival or death or on the date of death of the missing person ;
- (iii) persons whose personal status may be affected by the survival or death of the missing person ; and
- (iv) persons desirous of adopting the minor children of the missing person, and institutions or organisations entitled under their domestic law to co-operate in such an adoption proceeding.

⁵ It is estimated that there are estates totalling 4,000,000 dollars awaiting distribution in New York State owing to difficulty of proving death of a testator or ancestor.

Articles 4 and 5.⁶ These were exceedingly difficult to draft owing to the different conceptions among the negotiating countries of the legal function of a declaration of death. In particular, it had to be borne in mind that in, for example, France and Belgium the courts may issue declarations of death in abstract, whereas in England they may be made only as ancillary to other proceedings. Paragraph 1 of Article 5 makes it clear that a declaration of death issued under the Convention creates a presumption of death but is not conclusive evidence of it. It may be noted that in English law a finding of death may be presumptive only (as in probate proceedings) or conclusive (as in divorce proceedings under Matrimonial Causes Act, 1937, s. 8).

Articles 8-10. These provide for the establishment of an international Bureau for Declarations of Death to which full information upon each application and its result would be sent for filing and promulgation to all Contracting States.

J. E. S. FAWCETT.⁷

THE POWERS OF GOVERNMENTS OF NON-INDEPENDENT TERRITORIES OF HIS MAJESTY TO ENTER INTO INTERNATIONAL AGREEMENTS

A learned contributor has supplied the following note :

His Majesty's Government in the United Kingdom is responsible for the foreign relations of the colonies, protectorates, protected States and United Kingdom trust territories. The conduct of foreign relations is an exercise of the prerogative of the Crown and the

⁶ Article 4. *Date of Death.*

1. In issuing a declaration of death, the competent tribunal shall determine the date and the time of death, taking into consideration any evidence or indication regarding the circumstances or the period in which death occurred.

2. In the absence of any such evidence or indication, the date of death shall be fixed as the date of disappearance.

3. The date of disappearance shall be the date of the last known indication of the existence of the missing person. It shall be determined by the tribunal taking into account facts brought to its attention and in particular the last news of the missing person.

4. In the absence of any evidence or indication regarding the time of death, it shall be declared to have taken place at the last moment of the declared day of death.

Article 5: *Effect of Declarations of Death.*

1. Declarations of death issued in conformity with the present Convention in one Contracting State shall constitute in the other Contracting States *prima facie* evidence of death and the date of death until contrary evidence is submitted.

2. However, the Contracting States may by special arrangements, which shall be notified to the Secretary-General, grant broader effects than those provided for in the preceding paragraph to the declarations of death issued in their respective territories.

⁷ United Kingdom Delegation to U.N. Mr. Fawcett's notes are an expression of personal opinion, and do not necessarily represent the official view of the U.K. Government.

responsibility for advising His Majesty on the exercise of this prerogative rests with His Majesty's Secretary of State for Foreign Affairs.

In colonies, the constitutions are contained in Letters Patent, Orders in Council and Royal Instructions. In most protectorates, the exercise of jurisdiction by His Majesty is as absolute as in the case of colonies, although regard is paid to any existing agreements with local rulers. The constitutional instruments of protectorates consist of Orders in Council made under the Foreign Jurisdiction Act, 1890, and Royal Instructions. In protected States it is necessary to examine the agreements with those States in order to determine the extent of the powers and obligations of His Majesty in respect of internal and external affairs. In trust territories, jurisdiction is exercised by the Administering Authority in accordance with the Trusteeship Agreement approved by the General Assembly of the United Nations.

The treaty-making power can be expressly or impliedly delegated by the Crown to a colonial Governor ('colony' is used throughout to cover all non-independent territories) who cannot act outside the scope of this delegation. Normally, agreements will only be made by colonial Governors which are of a purely local and administrative character not of sufficient importance for the agreement to be made expressly by His Majesty's Government in the United Kingdom on behalf of the colony. In practice, such agreements have been confined to postal matters and similar subjects of a purely administrative character. Article 102 of the Charter of the United Nations, as supplemented by Regulations adopted by the General Assembly in 1946, requires registration of all international agreements with the United Nations Secretariat. The expression 'every treaty and every international agreement' as used in Article 102 of the United Nations Charter has not been defined by the General Assembly, but there have been indications that it should be given a wide interpretation so as to include all agreements importing obligations for any member of the United Nations. When a colonial Government concludes an agreement which constitutes an 'international agreement', it should include in the preamble a statement that the colonial Government has been authorised to conclude such an agreement by His Majesty's Government in the United Kingdom. It should also be remembered that colonial legislation may be required to enable an agreement to be implemented, and in this way will indirectly limit the power of the Governor to exercise in practice a delegated prerogative, but in no event can colonial legislation empower him to act outside the limits of such delegated power.

The question is to determine to what extent in each case this

prerogative has been expressly or impliedly delegated, or indirectly limited by restrictions placed on the powers to enact colonial legislation.

First, express and general delegations of this prerogative power rarely occur, but there have been such intimations in directives of the Secretary of State, although nothing express has been contained in the constitutional instruments of the colonies. In particular cases when an agreement is solely of local application, there is no objection to full powers being issued to the Governor to sign the agreement by His Majesty's Government in the United Kingdom after they have approved the form and in some cases the substance of such agreement.

Secondly, subject to any such express limitations, the extent of the implied delegation of prerogative may depend upon the constitutional status of the colony and the subject-matter of the agreement concerned. It has been suggested that the higher the degree of dependence of a colony the wider can be assumed the extent of the prerogative impliedly delegated to it, although it remains doubtful whether in practice there will be any difference in the extent of the powers impliedly delegated to varying grades of colonial Governments.

As far as the subject-matter of an external agreement is concerned, the provisions of any proposed agreement must be such as :—

- (a) only allow of strictly local implementation and do not create any obligation for action on His Majesty's Government in the United Kingdom, although the latter has always a general responsibility internationally to ensure the fulfilment of its agreements. This clearly follows from the fact that the authority of a Governor is confined to his colony, and also (in cases where legislation is required to implement it) from the fact that colonial legislatures are in any event limited in their jurisdiction to the 'peace, order and good government of the colony'. For example, postal agreements are entered into locally between the Postal Administration of the colonial Government and an adjacent foreign territory, while general trade agreements (and many other types of agreement) and almost all multilateral conventions are concluded by the metropolitan governments concerned, although, of course, their negotiation may have been carried out by the local authorities;
- (b) are not inconsistent with any obligations imposed on the colony by any international agreement which is binding on that colony.

Finally, as in the United Kingdom where the implementation of an international agreement must sometimes depend upon legislation by Parliament, so colonial legislation may be necessary in order to implement the terms of an agreement concluded by the Governor. The constitutional instruments usually prohibit the Governor from giving his assent to laws, for example, affecting the currency of the colony appearing to be inconsistent with His Majesty's treaty obligations, imposing differential duties, or laws of extraordinary importance prejudicing His Majesty's prerogative or the rights and property of His Majesty's subjects resident outside the colony or the trade or shipping of the United Kingdom or other colonies. There is added an overriding proviso that, if the Governor is satisfied that an urgent necessity exists, he may give his assent to any Ordinance otherwise prohibited as above, unless again it is one which appears to him to be inconsistent with His Majesty's treaty obligations.

It should be observed that the positive methods of control of His Majesty's Government over colonial legislation depends upon the existence of official or unofficial majorities in the colonial legislature and, in the latter case, upon the reserve power (where it exists) of the Governor to enact legislation in the interests of good government, and finally upon the absolute power of Parliament to legislate for the colonies; negatively, the Governor has the power to withhold his assent to a colonial Bill and His Majesty retains power to disallow enacted legislation.

BOOK REVIEWS

Charter of the United Nations. By L. M. GOODRICH and E. HAMBRO. Second Edition. [World Peace Foundation : London : Stevens & Sons, Ltd. 1949. xvi and 710 pp. 25s. net.]

THE Charter of the United Nations came into force on October 24, 1945, and this well-known commentary on its text was published only a few months later in 1946. Most of those who were called on to teach or study international law and relations immediately after the war would acknowledge their debt to Professor Goodrich and to the Registrar of the International court for having provided many helpful signposts to the understanding of the loosely drawn Charter. The usefulness of the book is indeed proved by its translation into French, its reprinting twice in English and now by the call for a second edition.

The United Nations Organisation then being still in process of creation, the commentary in the first edition was necessarily derived chiefly from comparisons with the Covenant, from the Atlantic Charter, the United Nations and Moscow Declarations, and above all from the *travaux préparatoires* of the Charter itself, *i.e.*, the Dumbarton Oaks Proposals and the numerous volumes of the records of the San Francisco Conference. The Charter is not, however, merely a multilateral treaty. It is a constitution and, as Brierly said in 1946, 'Constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen'. Therefore, in the new edition, written in the very different circumstances of an established and working organisation, the authors set out to incorporate in their commentary an analysis of the practice which has developed from the various clauses of the Charter.

The authors in the first edition disclaimed any intention to produce a work of profound scholarship. Their intention was only to provide a guide to the understanding of the Charter in the form of an annotated text. The book has swollen by 300 pages but its design and form are unchanged. It is not a scientific exposition, either from the legal or political point of view, of the Charter of the United Nations as a whole. It remains the commentary on the Charter article by article and clause by clause with which its users

are familiar. This method of exposition inevitably has its own disadvantages; it does not, for example, always make it easy to obtain a clear picture of the integration of the various parts of the constitutional structure of the United Nations. On the other hand, the records of the proceedings of the United Nations grow visibly every day and it becomes increasingly difficult to keep track of significant developments. An annotated text of the Charter incorporating these developments therefore serves a real need in collating this necessary material for interpreting the Charter.

The bulk of the material and the frequently inconclusive nature of the proceedings of the United Nations render the task of providing a satisfactory digest of the practice no easy one. Nor, as is said in the preface, is it possible for an account of the practice of a rapidly evolving institution to be up-to-date and the new edition does not in fact attempt to incorporate systematically in the commentary the practice after the middle of 1948. Much that is significant has, of course, happened since that date including important interpretations of the Charter and of the nature of the Organisation in advisory opinions of the International court. The proceedings neither of the 1949 nor 1948 sessions of the General Assembly are covered so that the implications of the debates on such matters as the Italian colonies and the legality of the Atlantic Pact are not included. Nevertheless, the new edition does cover the main period in which the Organisation was engaged in creating its machinery and formulating the general body of its practice. Moreover most of the controversial issues in the field of security, domestic jurisdiction, voting, etc., had already been raised. The analysis of the practice has been skilfully done and consequently the book does provide a very useful commentary on the Charter as it appears in working dress. It also has the great merit of being dispassionate and objective.

The full texts of four new documents are included in the book: the Convention on the Privileges and Immunities of the United Nations, the Headquarters agreement, the Tanganyika Trusteeship agreement and the agreement between F.A.O. and the United Nations. The useful bibliography is also extended. With these additions, the book now contains 710 pages and, if it is not to lose its character as a handbook, the inclusion of the practice of the United Nations in the commentary will in the next edition call for the exercise of a very difficult discrimination. Happily, the price of this edition remains very reasonable for a book of its size and, if scarcely a handbook, it is a serviceable and valuable instrument for exploring the Charter. Oddly enough, one of the less satisfying features are the pages on the principles governing interpretation of that document.

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Internationales Zivilprozessrecht. By ERWIN RIEZLER. [Berlin : Walter de Gruyter & Co., and Tübingen : J. C. B. Mohr (Paul Siebeck). 1949. 710 pp.]

TEXTBOOKS on 'Civil Procedural International Law' have not appeared for a long time. A Swiss book, by J. Meili, was published in Zürich in 1906; an Italian book by G. Morelli (1938) antedated the new Italian code of civil procedure of 1940; two other Italian publications—by Fedozzi and Ghirardini respectively—are even older and both were left unfinished. In England, the United States, France, Germany, Austria and the Scandinavian States no textbook on the subject has ever been published.

And yet it would be incorrect to say that before Riezler's book there was a 'gap' in legal literature which had to be filled. For the subject-matter of the international law of civil procedure was entirely covered by most of the works entitled Private International Law.

Procedural International Law is, roughly speaking, that part of the law that is applicable to such procedural facts as contain a foreign element. It deals with international jurisdiction and immunity of extraterritorial persons and vessels, with recognition and enforcement of foreign judgments, with *lis alibi pendens*, with the distinction between procedural rules and rules of substantive character, particularly in the area of evidence and burden of proof, with the ascertaining of foreign law, and with numerous other questions, all of which belong to Private International Law, in particular to Conflict of Laws. It deals also with what French legal writers regard as part of Private International Law, the *condition des étrangers*, in respect of the position of aliens in law suits (*cautio iudicatum solvi* and other points).

But although the subject of the author's book has been treated before him under a different designation by writers on Private International Law, Riezler's book is by no means superfluous. Private International Law written from the point of view of procedure is not quite the same as the exposition of the same subject centred in substantive law and according only incidental treatment to procedural questions. The author with excellent judgment and admirable restraint delves deeply into each of the numerous procedural problems. He also deals thoughtfully with some of the fundamental problems of all private international law, such as the doctrine of classification (pp. 101 *et seq.*), the notion of public policy (pp. 540 *et seq.*), and with the history of his subject. Every chapter of his book starts by explaining and commenting on German law; he then gives a careful comparison of the results with Austrian, Swiss, French, Italian, Spanish, English law and the laws of the United States of America, as well as with other legal systems. There is one curious mistake with regard to the

American Restatement of Conflict of Laws, of which the author says 'though it is not law it is everywhere recognised as decisive source (*massgebende Quelle*)', which is certainly not correct. The parts concerning English law are particularly well done. If the author should publish a new edition of his work—as is to be hoped—he might be well advised to omit his description of the 'common law' (p. 293): common law is not a 'customary law recognised by judicial practice'.

Among the remarkable points which make the book interesting, a few may be mentioned here. In speaking of the principle of territoriality the author distinguishes legal rules, legal institutions, and legal rights. Legal rules are always restricted to the territory of the State. Most of the legal institutions are not so restricted, and the same is true of legal rights which are for the most part not confined to a particular territory, but are effective everywhere. He rightly excepts patents, designs, trade-marks, and even literary copyrights. The general principle, however, which he tries to establish can hardly be accepted: according to the author such rights 'as owe their creation to an act of State authority' are territorial in character (p. 85). Is this consistent with his doctrine that copyrights are territorial? And how can it be explained that some State acts, such as expropriation or confiscation, create rights which in their effect are not limited to the territory of the State?

The best parts of the book are those relative to the distinction between procedural and substantive rules and those concerned with arbitration. Writers on private international law sometimes neglect the latter topic. Notably English textbooks are silent on arbitral tribunals, their procedure, and the award. The sixty pages (pp. 595 *et seq.*) which the author dedicates to this subject are particularly useful.

MARTIN WOLFF.¹

Archiv des Völkerrechts. Vol. I, Part 4; Vol. II, Part 1. Ed. by DR. W. SCHÄTZEL, DR. H. WEHBERG, and DR. H. J. SCHLOCHAUER. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1949.]

THIS new periodical, devoted to the study of the Law of Nations, presents in the two numbers under review a series of studies in special subjects and very valuable reports on problems of international law of European importance, such as the Trieste problem, the European Union plans, the North Atlantic Pact, the Benelux Economic Agreement, the Franco-Italian Customs Union, a report on Finland's international position since 1917, finally the text of some documents, several decisions, and book reviews.

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Among the special articles, a study by W. Schätzel on Annexation in International Law deserves mention, although it will probably not be left entirely unopposed. The author, who wrote a book on the same subject in 1920, repeats that 'annexation is always a grave violation of the will of a sovereign State', and therefore a wrong. But if all States 'recognise' that the victor has acquired a title by war and conquest, it cannot make any difference whether the vanquished enemy is induced by force to transfer his title to the victor by a treaty, or whether the conquest is recognised without a cession. The acquisition by annexation is acquisition by recognition of conquest. Such annexation is not identical with 'adjudication'.

Dr. Franz Scholz in his article on International Law and Legal Security discusses the well-known defects and weaknesses of the Law of Nations, all of which he derives from the lack of security. He defines legal security as the 'well-founded confidence in the rule of law and in its impartial and just working'. He hopes for an evolution towards security, which in any conflict cases dangerous to peace should be reached by a compulsory approach to an international tribunal, by the establishment of procedural rules, and by facilitating enforcement of the tribunal's decisions. He insists on extermination of imperialism, militarism, *sacro egoismo*, and all the exaggerations of sovereignty that are to be found everywhere. No one can doubt that this is a highly desirable goal.

Dr. G. Leibholz in a short article on the present status of international law advances similar hopes. He contrasts the international law of our days, which is a 'product of national States and absolute monarchies', and which shows a misuse of sovereignty, with an international law of the future. In fact, though not in law, the notion of sovereignty has lost a good deal of its value in Eastern Europe under the Russian influence on her satellite States. In Western Europe the movement has been and will be slower; but some steps 'in the right direction' have been taken there too. The author designates as such the Brussels agreement between Great Britain, France and the Benelux States, the French-Italian Customs Union and the Marshall Plan conferences. The goal at which—according to the author—one must arrive is 'a real European Union and' (or?) 'a genuine European Federal State'. The author, however, recognises that even if the Western European States are prepared to allow considerable limitations of their sovereignty, the scission between West and East remains; the Western way of living and thinking and the totalitarian ideas of the East are irreconcilable.

Dr. Ellinor von Puttkamer presents a satisfactory historical study on the responsibility of the military and political German leaders in the *first* world war for causing the war and for committing or allowing war crimes. She explains the genesis of Articles 227–230 of the Treaty of Versailles and describes how they were implemented. The main problem (in and after the first world war) was :

is it illegal or merely immoral to cause war? The authoress holds that the illegality of war-making was present in the minds of many nations, but that 'the majority of civilised nations' was not yet prepared to express this conviction. This statement is important also for any student of the Nuremberg trials after the second world war.

MARTIN WOLFF.

Traité de Droit International Privé, Volume VI. By J. P. NIBOYET. [Paris : Librairie du Recueil Sirey. 1949. 582 pp.]

THIS is the last volume of Professor Niboyet's monumental *Traité*. An earlier volume was reviewed by Martin Wolff in (1947) 63 L.Q.R. 323, where its somewhat political flavour was duly noted. The sixth volume, fortunately, is not so burdened, but fully bears out the great scholarship on which the author's reputation deservedly rests. It is a book which every student of private international law will value highly, not only because it contains a clear exposition of the author's views, but also because, in contrast to many other French works, it pays unqualified respect to the practice of the French courts in which foreign observers will primarily be interested.

The first part of the present volume deals with what Professor Niboyet describes as '*Conflits des Autorités*' and contains variations on the theme provided by the rule *auctor regit actum*. To some extent the problem is known in this country under the heading of act of State, but it has everywhere been greatly neglected and the guidance given by Professor Niboyet is, therefore, particularly welcome. Broadly the problem is in what circumstances the official act of a foreign public authority is capable of or requires recognition by the *lex fori*. The general rules developed by Professor Niboyet are that the foreign authority must have competence in the international sense (a point determined by French private international law) as well as competence according to its own law. A public Act which is valid under its own law has the force attributed to it by such law. If the public Act has been attacked under its domestic law, French law accepts the consequences, and Professor Niboyet views with some doubt the decision of the Cour de Cassation according to which a Frenchman who was naturalised in Spain lost his French nationality notwithstanding the fact that ten years later the naturalisation in Spain was declared void. If the public Act has not been attacked, it may, in certain circumstances, yet be subject to criticism by French courts and, if it is found to be invalid according to its domestic law, its '*inopposabilité*' in France follows. From this introduction Professor Niboyet proceeds to discuss the details.

He divides his subject into two main headings, *Authorités Territoriales* and *Authorités Extraterritoriales*. The former topic is sub-divided into *actes juridiques* (e.g., marriage ceremony, compulsory sales, consents, notarial acts and so forth), *actes de collaboration entre les autorités respectives* such as extradition, social insurance, taxation, and *actes d'administration des personnes et des patrimoines* (guardianship, bankruptcy, liquidation). Under the latter heading Professor Niboyet discusses similar acts done outside France by French authorities and done in France by foreign authorities. All these problems are of great practical importance, although they lead only rarely to litigation, and there is no doubt that the author's very intensive investigation will prove helpful.

The second part of the book deals with Jurisdiction. Its chief value lies not so much in the discussion of a general theory of territorial jurisdiction in France as in the presentation and explanation of the prevailing practice. Jurisdiction may have a political basis according to the status or nationality of one of the parties; it may also have a '*base juridique*' determined by the object of the proceedings. Accordingly, as to the former, Professor Niboyet describes its positive effect by reference to the famous Articles 14 and 15 of the Code Civil which make jurisdiction dependent upon the French nationality of the plaintiff and defendant respectively, and its negative effect by reference to immunities and to the now almost obsolete rule that French courts have no jurisdiction in regard to proceedings between foreigners. As to jurisdiction afforded by reason of the object of the proceedings Professor Niboyet deals with a number of French provisions which are primarily intended to delimit local or internal jurisdiction, but which also have international implications.

Throughout, full regard is had by the author to international Conventions to which France is a party and which relate to the fields explored by him.

This is an extraordinarily comprehensive work which, on the whole, is written with admirable clarity and which no student interested in the present state of French private international law can afford to ignore.

F. A. MANN.¹

Le Cabotage Aérien. By DR. ALEX MEYER. [Paris : Les Editions Internationales. 1948. 100 pp.]

THE value of the conventions by which States have from time to time agreed to grant privileges in the use of their airspace for international flight has always been seriously diminished by the practice of adding limitations and provisos which may go a long

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way towards nullifying the apparent grant. Not the least troublesome of these common form provisos is that reserving cabotage to national aircraft. At first sight cabotage appears to have the advantage of being at any rate a comparatively simple notion, obviously derived by analogy from the well-known institution of maritime law; but like many of the notions imported from maritime law it is found to be dangerously imprecise when applied to the very different conditions of air law. If, for example, an aircraft coming from another country calls at more than one airport in the country of destination in order to set down passengers, is it engaging in cabotage? Is a flight between places in the same territory but with an intermediate call in another territory, or even an intermediate flight over another territory, an attempt to engage in cabotage? What exactly is the meaning of territory for this purpose? Does it mean a territory in the geographical sense or does it include all the territories of a far-flung empire? These and many similar questions are of considerable practical importance to international civil aviation, but they are not questions to which it is easy to give any precise answer.

An imprecise notion like cabotage lends itself all too easily to illiberal interpretation. The first step towards reducing it to a properly defined legal concept is scholarly analysis of the existing materials. This Dr. Alex Meyer, to whom students of air law are already indebted for his numerous contributions to the study of air law, has set out to do in a very useful monograph. Beginning with an amusing parable about a toreador from Madrid who, anxious to perform at a bull fight in Barcelona, got himself transported there in a Swiss plane by booking a ticket to Geneva and so learned about cabotage, Dr. Meyer then plunges into a ruthlessly thorough analysis of the materials: cabotage provisions in national laws, and in multilateral and bilateral treaties; judicial decisions; the work of bodies like CINA and the ICAO; and the analogous institutions of maritime and river laws. As far as the reviewer is aware, this is the only systematic monograph on the subject. Suffice it to say that any future worker in this field would be ill-advised to omit it from his reading list.

R. Y. JENNINGS.¹

L'Organisation des Nations Unies. By LAZARE KOPELMANAS.
[Paris: Sirey. Vol. 1, Fasc. 1. 1947. viii and 327 pp.]

DR. KOPELMANAS indicates at the outset of his study of the United Nations that he is fully conscious of the fact that it is a living organisation, and that what is true of its legal status at its inception may very well alter under the pressure of long practice. He

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feels, however, that a true understanding of the original legal status of the United Nations is essential. It is not the purpose of *L'Organisation des Nations Unies* to provide—as so many others have done—an Article by Article study of the Charter. Frequently a particular matter is dealt with in a number of various articles and the learned author contends that the Charter itself is not enough, for a considerable amount of important material, particularly from the point of view of interpretation, is to be found in the proceedings of the San Francisco Conference and the early meetings of the General Assembly. Dr. Kopelmanas intends, therefore, to provide a functional survey of the United Nations. That this is the correct way of determining the legal status of the Organisation has been made clear by the International Court of Justice in its Advisory Opinion concerning *Reparation for Injuries Suffered in the Service of the United Nations*.

The first volume of *L'Organisation des Nations Unies* deals with the constitutional structure of the United Nations and this, its first fascicule, is devoted to the constitutional sources.

By its very nature Dr. Kopelmanas' work leads him into a study of many points of ordinary international law and not merely those devoted to the law of international institutions. Thus there is a lengthy discussion in connection with ratification. Despite such treaties as the Anglo-Soviet Alliance of 1941 and the UNRRA Agreement, Dr. Kopelmanas contends that there is a definite rule of international law in accordance with which a treaty becomes binding only on ratification. Having postulated this he goes on to discuss the ratification clause of the Charter and argues that the reference to 'constitutional processes' in Article 110 (1), if it is to mean anything, must render the Charter authoritative internally as well as internationally. Cases like *Kemp v. Rubin* (1947) 69 N.Y.S. 2d 680 and *Shelley v. Kraemer* (1948) 334 U.S. 1, however, do not support this argument. It is often argued that a purported but unconstitutional ratification is of no effect, but Dr. Kopelmanas shows that the Charter did not deal with this issue, and in practice instruments of ratification have been accepted without any question as to their regularity being raised; in fact, that of the Union of South Africa was, at the date of execution and acceptance, unconstitutional.

In the light of the Advisory Opinion already mentioned it is interesting to read the author's discussion on the effective scope of the Charter. He points out that at San Francisco it was clearly understood that the Charter would come into force and create the Organisation only for those members who had ratified the Charter. For other signatories this only took effect from the date of ratification. This is, of course, in accordance with well-established rules of international law, and only serves to emphasise the revolutionary, if not 'illegal' character of Article 2 (6) and the Court's Advisory Opinion.

Dr. Kopelmanas reminds us that Article 2 (7) makes no mention of international law when referring to matters within the 'domestic jurisdiction' of the members, but he argues that the significance of this is easily exaggerated and that the test must still be in accordance with the principles of international law. Nevertheless, he recognises that this clause is the easiest medium for evading the Charter since it makes no reference to any sort of measuring rod. He says that each organ of the United Nations must decide this matter for itself, and explains the omission of any reference to international law by the opposition of the United States to anything which might be equivalent to the introduction of compulsory jurisdiction by a backdoor. It is to be hoped that in a future volume of *L'Organisation des Nations Unies* Dr. Kopelmanas will consider the effect of the reservation introduced by the United States—and France, Mexico and Pakistan—into its declaration under Optional Clause of the court's statute.

Although the author refers to the invitations sent to the Ukrainian and Byelorussian Soviet Socialist Republics to attend San Francisco, he does not discuss the very interesting problem of the effect of such invitations from the point of view of the recognition of States. Similarly there is some discussion of the work of the Preparatory Commission of the United Nations but little or no reference to the actual handing over from the League to the new Organisation.

Whatever significance such omissions may possess, they in no way detract from the general value of Dr. Kopelmanas' study. It is now two years since the publication of the first fascicule and we look forward with anticipation to the completed work.

L. C. GREEN.

Ways and Means of Making the Evidence of Customary International Law More Readily Available: Preparatory Work within the purview of Article 24 of the Statute of the International Law Commission (Memorandum submitted by the Secretary-General). [New York: United Nations. 1949. 114 pp. 75 cents.]

THE ground of the reviewer of this publication of the Division of Codification and Development of International Law of the United Nations' Secretariat is completely cut from under his feet by the remarks of Professor Preuss in the issue of the *American Journal of International Law* for October, 1949. Professor Preuss describes it as 'the most complete and usable bibliographical manual which has appeared in this field'. The late-comer can add nothing to this opinion of this excellent memorandum except to observe that Professor Manley O. Hudson has undertaken to prepare a working

paper for the next session of the International Law Commission on the same topic of ways and means, and that it will be interesting to see how far the Commission is prepared to adopt the suggestions of the Secretariat for the improvement of the documentation of international law. These suggestions are of a most ambitious nature. But their implementation—or even a good beginning—might do more to enhance the reputation of the Commission and to increase the value of its contribution to the development of international law than perhaps any other task it may take up. The part of the Commission must, however, inevitably be limited to direction. The actual work must be carried on by Governments, the Secretariat and individuals, either independently or in combination. And, without the co-operation of Governments, at least to the extent of opening their archives, relatively little can be achieved.

In so far as it concerns the Government of the United Kingdom, its past record of service to the international lawyer is most honourable. As this memorandum points out, the British practice of issuing Blue Books began in the eighteenth century and served as an example to other States. The series entitled *British and Foreign State Papers* began to appear in 1852 and was carried backwards to 1812 as well as forwards. All records, with a few exceptions of minimal importance, have for long been open up* to 1885 and recently what may be termed the period of official secrecy has been shortened somewhat. Even before this step was taken there were large gaps in the oblivion which shrouds the modern period, created by the publication of, first, the *British Documents on the Origin of the War, 1898–1914* and, more recently, of the documents on the origin of the later war.

But the opening of the archives is not necessarily notice of their contents. Thus the two hundred volumes of Law Officers' Opinions attracted little attention before the publication of Dr. Smith's *Great Britain and the Law of Nations*. That work, which remains uncompleted, as, again, this memorandum points out, has since been followed by Sir Arnold McNair's *Law of Treaties*, Dr. Mervyn Jones' *Full Powers and Ratification* and Professor Lauterpacht's *Recognition*, all of which draw on the same source. And, though the offices of State appear to have assisted the individual scholars named most freely, no comprehensive British publication comparable to the American digests of Moore and Hackworth has yet appeared.

In so far as concerns case law and legislation of international concern, too, the English initiative has been individual. The admirable *Annual Digest and Reports of Public International Law Cases*, which of course is not by any means confined to cases decided in British courts, has thus appeared under the names of Sir John Fischer Williams, Sir Arnold McNair and, lastly, of Professor Lauterpacht, to whom is due great credit for having piloted the

undertaking through the late war, wherein were extinguished, at least temporarily, so many other series. And the distinguished editor is now casting his eyes backwards to the Jay Treaty as well as forwards. His Majesty's Stationery Office, on the other hand, has made no progress since before the war with its *Constitutions of All Countries*, which began so bravely with *Volume I, The British Empire*.

If the Secretariat had its way, all countries, including this, would undertake or sponsor digests of their State practice and collections of their case- and statute law of international import. The Chairman of the Commission appears to regard the compilation in this way of a *Corpus Juris Gentium* as being at present but a thing to be dreamed of. No doubt Professor Hudson, who so skilfully directed the Harvard Research for so many years, who has himself given us the *International Legislation*, and who led the expedition for the relief of the *League of Nations Treaty Series*, knows well what he is about in advocating a more cautious approach. But it would be pleasant to think of the Foreign Office echoing, *mutatis mutandis*, Maitland's words anent the Year Books: 'I live in terror lest the Savigny Stift or the Ecole des Chartes should begin an edition'. In a day when transatlantic teams, armed with miles of microfilm, are busy recording the practice of the lately deceased private coal industry nothing is impossible. Liebermann escaped with the Anglo-Saxon laws in spite of Maitland. And Herr von Gretschanimow made a highly successful raid on what was then Professor Smith's territory, of which the fruit is the *Digest of the Diplomatic Correspondence of the European States in the Fontes Juris Gentium*. The 'danger' is perhaps no longer from the East! 'Selden's England' may again face 'conquest', and this time there are none we cannot treat as foreigners because 'our law is their law; at times we can even be cosmopolitan enough to regret an arrangement of our universe which has placed our records in one hemisphere and those who would make the best use of them in another'.

CLIVE PARRY.¹

War Crimes Trials. Vol. 6. (The Trial of von Falkenhorst.)
[London: Wm. Hodge & Co., Ltd. 1949. xlii and 278 pp.
18s.]

THIS volume deals with the trial of the former Colonel-General von Falkenhorst, Commander-in-Chief German Armed Services, Norway, during the period from the German occupation of that country until December, 1944. The main charges against him were twofold: his

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transmission to lower formations and his adaptation of a command from Hitler ordering the summary execution or handing over to the S.S. Security Service of certain types of prisoners, and his responsibility for the execution or for action tending towards execution of particular allied prisoners, in accordance with the order. He was found guilty of seven charges out of nine, and sentenced to death, this sentence being later commuted to twenty years' imprisonment. The chief point in issue was the responsibility of senior commanders with regard to admittedly illegal orders issued by undoubted higher authority and their responsibility for acts done by forces under their command in pursuance of this order. A special feature of this trial was the fact that one of the defence witnesses, a major-general, had previously been acquitted of charges in respect of the same notorious Hitler order and of one of the specific acts of which Falkenhorst was found guilty. Thus, while it has been established in these war crimes trials that both the authority issuing an illegal order of this sort, and the persons immediately concerned in its execution, cannot successfully plead superior orders in defence, the responsibility in the middle regions of the administrative clearing house has not been authoritatively defined.

The record of the trial is historically valuable as another illustration of the reactions of the military type of German defendant in war crimes trials when the monstrosity of their actions is judged by the solemn procedure of official justice. Once again the defence raised the same utterly irrelevant points; the knightly qualities of the German soldier, the unchallenged supremacy of the trusted Fuhrer combined with universal reservations (mostly mental) as regards the justice of the actions. In this case an attempt was made to mislead the court as to the responsibility of the Commander-in-Chief, Norway, towards the Naval and Air Forces under his command, a point on which the court had to be authoritatively informed by an intelligence officer under somewhat dramatic circumstances. It is always difficult to see in the pathetic bureaucrats of the courtroom the ruthless commanders who carried the Swastika through Europe without mercy or scruple.

The editor (Mr. E. H. Stevens), in his introduction to this volume, gives a useful if somewhat sketchy background to the personalities and actions concerned in the trial. It is to be hoped that the trend noticeable in this series will be followed and completed in the future, so that the introduction may always be written by those well acquainted with the details of the alleged crimes and criminals, and may make available to the reader those personal impressions and background facts which the verbatim report of a trial cannot provide.

PETER NETTL.¹

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Current Legal Problems. Vol. 2. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. 1949. 288 pp. 21s.]

THIS volume, like its predecessor, consists of the texts of lectures delivered at University College, London. Two of the contributors are Lords of Appeal, the late Lord du Parc and Lord Porter. Lord du Parc in his paper on the Final Court of Appeal offers the rather startling observation that it is likely that a lay peer was a member of the House of Lords which decided *Rylands v. Fletcher*. Lord Porter's subject is English Procedure and Practice, with particular reference to criminal matters. This is a valuable essay, particularly as Lord Porter's experience leads him to criticise some of the present rules of criminal procedure and practice, which, in his view, at times show too much regard for the sporting theory of justice and perhaps too little for other interests of the community.

The volume covers a wide diversity of subject-matters. There are essays on problems in criminal law, the law of trusts, and the philosophy of law. The perennial problems of codification of English law and the law of possession are again ventilated. There are interesting essays in constitutional law. Professor Wade discusses Constitutional Aspects of the Public Corporation, while Mr. Fitzgerald poses a question: The Twilight of Dominion Status? which he answers negatively. The author favours the establishment of Commonwealth arbitral machinery to deal with inter-Commonwealth disputes, such, for instance, as the India-Pakistani dispute over Kashmir. A recent newspaper report of a statement by Mr. Noel-Baker after the Colombo Conference suggests that there is not much official enthusiasm for such a plan in the United Kingdom.

Of especial interest to international lawyers are the essays by Professor Lawson and Mr. Green. Professor Lawson discusses Private Law Aspects of Western Union. He correctly observes that even the establishment of a comparatively tight form of Western Union would not necessarily lead to a unification of private law systems. However, a Western European Legislature might profitably turn its attention to achieving some measure of uniformity, notably in the fields of commercial law and private international law. In the latter field, Professor Lawson expresses regret at the tendency to move steadily away from internationalist doctrines. Certain of his statements may perhaps be questioned. His comments on the doctrine of *renvoi* are not altogether above reproach. He suggests also that the relations of States in a Western Union might lead to the abandonment of resort to the doctrine of public policy to deny the operation of an otherwise applicable choice of law. It should be noted that, subject to exceptions in the case

of recognition of judgments of sister States, this has not been the case in the United States. Mr. Green contributes an interesting paper on Membership in the United Nations. He examines in some detail the fate of applications for membership in the United Nations, and observes that the conflicts over this issue are yet a further reflection of the general conflict between East and West.

This is an interesting volume. As is not surprising, the essays are not of even quality. One or two are rather poor and unoriginal and scarcely warrant publication. On the whole, however, there is a good balance of subject-matter, and a number of the papers are thought provoking and valuable. The volume is attractively produced.

Legal Theory. By W. FRIEDMANN. Second Edition. [London : Stevens & Sons, Ltd. 1949. xxiii and 470 pp. 30s. net.]

ALTHOUGH Professor Friedmann's *Legal Theory* was first published as recently as 1944, the work is already so well known that a comprehensive review of a second edition would be justified, only if it embodied far-reaching changes. *Legal Theory* is not in the tradition of English textbooks on jurisprudence. Professor Friedmann not only violates, but deliberately spends most of his time beyond, the frontiers of what the analytical positivists regard as the domain of the jurist. The second edition like the first is, in the words of the author, 'not concerned with the whole field of jurisprudence but with that part of it which concerns the ends of law. Its purpose is still the dual one of giving a concise account of the main trends of legal philosophy and of investigating the relations between legal theory, social evolution and positive law'.

The first five parts of the book, which are devoted to the former purpose of presenting an historical survey, are in the main unaltered in the new edition. Greater (perhaps disproportionately great) attention is given to the work of Roscoe Pound. The chapter on 'Socialist Thought on Law' has been recast so as to embody the author's interpretation of recent developments in jurisprudence in the U.S.S.R. Reference is made to some jurisprudential implications of contemporary partial socialisation in the United Kingdom.

Any general evaluation of Professor Friedmann's historical account must vary according to the valuer's conception of its purpose. It is extremely comprehensive; but a corollary—unavoidable owing to limitations of space—has been a measure of superficiality in the treatment of individual jurists. This circumstance, together with the fact that the author neither purports to, nor has, put forward any original theory of his own, will limit the value of the work to the mature scholar. From the point of view

of its usefulness to the less advanced student, one must, as Professor Campbell¹ has pointed out, never lose sight of the fact that 'If the student is confined to reading summaries, however clear, and criticisms however acute, of the great original writers, his learning will tend, especially if he is working for an examination, to become a mere memorising of names and labels and second-hand judgments. It is good to develop the faculty of memorising, but the curriculum of a law school offers of necessity many other occasions for this'. This criticism is unanswerable. But the fault lies not in Professor Friedmann's book, but in the effect of the time factor on the average student. *Legal Theory* would provide an excellent introduction to work on original authorities. But if such work is impossible, the value of the introduction may be doubted.

Parts 6 and 7 deal with the relationship between legal theory and legal practice. Here there have been several changes. The chapters on 'Social Security and Some Recent Developments in the Common Law' and 'Freedom of Trade and English Law' have been omitted. The treatment of the judicial function has been modified and elaborated. Two new chapters have been added, dealing respectively with the fruitless search for absolute ideals of justice, and the principal antimonies in legal theory.

The author's overall aim has been to dispel the delusion that legal theory is of little concern to the English lawyer. If Professor Friedmann does not succeed in this pioneering work, the cause will be not his book's inadequacy, but rather uninspired last-ditch resistance by the protagonists of that introvert jurisprudence which has been nurtured under a hitherto stable economic and social structure.

P. B. CARTER.

¹ 61 L.Q.R. p. 309.

LIST OF DOCUMENTS

I. AGREEMENTS AND OTHER DOCUMENTS ¹

- Agreement between the Government of the U.K. and the Italian Government relating to Air Services between their Respective Territories. [Italy 1950/1, June 25, 1948, Cmd. 7899.]
- European Broadcasting Convention (with Copenhagen Plan, Protocols, Statements, Recommendation, Resolutions and Opinion). [Treaty Series 1950/30, September 15, 1948, Cmd. 7946.]
- European Regional Convention for the Maritime Mobile Radio Service (with Copenhagen Plan, Statements, Resolution and Recommendations). [Treaty Series 1950/29, September 17, 1948, Cmd. 7947.]
- Exchange of Notes between H.M. Government in the U.K. and the Government of the United States of America regarding Visas. [Treaty Series 1950/12, November 9-12, 1948, Cmd. 7893.]
- Protocol bringing under International Control Drugs outside the scope of the Convention of July 13, 1931, for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol of December 11, 1946. [Treaty Series 1950/4, November 19, 1948, Cmd. 7874.]
- Agreement between the Government of the U.K. and the Government of the Turkish Republic to establish Drawing Rights in favour of Turkey for the purpose of the European Payments Agreement of October 16, 1948. [Treaty Series 1950/17, January 25, 1949, Cmd. 7905.]
- Further Amendment to the Schedule of the International Whaling Convention signed at Washington on December 2, 1946, adopted at the First Meeting of the International Whaling Commission. [Treaty Series 1950/20, May 30-June 7, 1949, Cmd. 7918.]
- Memorandum of Understanding relative to the application to the Western Sectors of Berlin of the Agreement on Most-Favoured-Nation Treatment for the Areas of Western Germany under Military Occupation. [Treaty Series 1950/7, August 13, 1949, Cmd. 7876.]
- Report on the Proceedings of the Fourth Session of the General Assembly of the United Nations held at New York, September 20-December 10, 1949. [United Nations 1950/1, Cmd. 7924.]

¹ Can be purchased directly from His Majesty's Stationery Office.

- Convention between the Governments of the U.K., Belgium, France, Luxembourg and the Netherlands to Extend and Co-ordinate Social Security Schemes in their application to the Nationals of the Parties to the Brussels Treaty. [Miscellaneous 1950/3, November 7, 1949, Cmd. 7911.]
- Memorandum regarding the Disposal of Unused Drawing Rights for France established under the Agreement for Intra-European Payments and Compensations of October 16, 1948. [Treaty Series 1950/14, December 1, 1949, Cmd. 7900.]
- Exchange of Notes between H.M.G. in the U.K. and the Royal Netherlands Government extending the Visa Abolition Agreement of March 21, 1947 to certain British Overseas Territories. [Treaty Series 1950/1, December 1-10, 1949, Cmd. 7860.]
- Memorandum regarding the Disposal of Unused Drawing Rights for the Bizone and French Zone of Germany established under the Agreement for Intra-European Payments and Compensations of October 16, 1948. [Treaty Series 1950/15, December 15, 1949, Cmd. 7901.]
- Exchange of Notes between His Majesty's Government in the U.K. and the Italian Government further extending the Sterling Payments Agreement of November 26, 1948. [Treaty Series 1950/8, December 16, 1949, Cmd. 7877.]
- Exchange of Notes between His Majesty's Government in the U.K. and the Government of the Union of Burma regulating Commercial Relations pending the conclusion of a new Treaty of Commerce and Navigation. [Treaty Series 1950/16, December 24, 1949, Cmd. 7902.]
- Exchange of Notes between the Government of the U.K. and the Government of Finland constituting an Agreement relating to Insurance and Reinsurance Contracts. [Treaty Series 1950/9, December 28, 1949, Cmd. 7886.]
- Sterling Payments Agreement between the Government of the U.K. and the Austrian Federal Government. [Treaty Series 1950/18, January 26, 1950, Cmd. 7909.]
- Mutual Defence Assistance Agreement between the Government of the U.K. and the Government of the United States of America. [Treaty Series 1950/13, January 27, 1950, Cmd. 7894.]
- Agreement between the Government of the U.K. and the Government of the French Republic regarding the Reciprocal Application of the Social Security Schemes of France and Northern Ireland. [France 1950/1, January 28, 1950, Cmd. 7906.]
- Exchange of Notes between the Government of the U.K. and the Government of Peru regarding the continuance in force of Articles 4 and 5 of the Anglo-Peruvian Commercial Agreement

of October 6, 1936. [Treaty Series 1950/24, January 28, 1950, Cmd. 7931.]

Declaration by the Chancellor of the Exchequer and the Foreign Ministers of Denmark, Norway and Sweden, approving recommendations for closer economic co-operation between their respective countries. [Miscellaneous 1950/2, January 30, 1950, Cmd. 7884.]

Exchange of Notes between the Government of the U.K. and the Government of Italy regarding the revival of certain pre-war treaties. [Treaty Series 1950/27, February 2-24, 1950, Cmd. 7943.]

Exchange of Notes between H.M.G. in the U.K. and the Government of Israel for the continuance in force of the Arrangement of 1947 for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. [Treaty Series 1950/19, February 10, 1950, Cmd. 7912.]

Exchange of Notes between H.M.G. in the U.K. and the Swiss Government modifying and prolonging the Monetary Agreement of March 12, 1946. [Treaty Series 1950/31, March 4, 1950, Cmd. 7952.]

Exchange of Notes between the Government of the U.K. and the Belgian Government further prolonging until June 30, 1950, the Monetary Agreement of November 14, 1947. [Treaty Series 1950/23, March 8, 1950, Cmd. 7930.]

Agreement between the Government of the U.K. and the Government of Israel for the settlement of financial matters outstanding as a result of the termination of the Mandate for Palestine. [Treaty Series 1950/26, March 30, 1950, Cmd. 7941.]

Agreement between His Majesty's Government in the U.K. of Great Britain and Northern Ireland and the Government of the Republic of Paraguay relating to Trade and Payments. [Paraguay 1950/1, April 3, 1950, Cmd. 7940.]

II. STATUTORY INSTRUMENTS ²

The Trading with the Enemy (Authorisation) (Japan) Order, 1950. [No. 28, January 6.]

The Trading with the Enemy (Transfer of Negotiable Instruments, etc.) (Japan) Order, 1950. [No. 29, January 6.]

The Trading with the Enemy (Custodian) (Amendment) (Japan) Order, 1950. [No. 30, January 6.]

The Trading with the Enemy (Custodian) Order, 1950. [No. 494, March 28.]

² Can be purchased directly from His Majesty's Stationery Office.

- The Diplomatic Privileges (General Amendment) Order in Council, 1950. [No. 515, March 31.]
- The Patents, etc. (Israel) (Convention) Order, 1950. [No. 522, March 31.]
- British Nationality—The Deprivation of Citizenship Rules, 1950. [No. 593, April 11.]

III. UNITED NATIONS DOCUMENTS ³

- Report of the Ad Hoc Committee on Statelessness and Related Problems. [E/1618, E/AC.32/5, February 17, 1950.]
- Commission on Status of Women, Memorandum by Secretary-General on Constitutions, Laws and other Legal Instruments Relating to Nationality of Married Women. [E/CN.6/129, February 21, 1950.]
- International Law Commission, Report by Ricardo J. Alfaro on the Question of International Criminal Jurisdiction. [A/CN.4/15, March 3, 1950.]
- International Law Commission, Report by J. P. A. Francois on the High Seas [A/CN.4/17, March 17, 1950.]
- International Law Commission, Report by Georges Scelle on Arbitration Procedure. [A/CN.4/18, March 21, 1950.]
- International Law Commission, Replies from Governments to Questionnaires. (Part I—Law of Treaties, Arbitral Procedure, Régime of the High Seas.)
(Part II—Replies from Governments Concerning a Draft Code of Offences against the Peace and Security of Mankind.) [A/CN.4/19, March 23, 1950.]
- International Law Commission, Formulation of the Nüremberg Principles, Report by J. Spiropoulos. [A/CN.4/22, April 12, 1950.]
- United Nations Interim Committee, Memorandum by Secretariat on Recent inter-American Experience in the Field of Pacific Settlement. [A/AC.18/SC.9/L.6, April 21, 1950.]
- International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind, Report by J. Spiropoulos. [A/CN.4/25, April 26, 1950.]

IV. DOUBLE TAXATION AGREEMENTS ⁴

- (Published since January 1, 1949, and prepared by Mr. F. E. Koch)
- Arrangement between His Majesty's Government and the Government of Barbados for the Avoidance of Double Taxation

³ The United Nations Information Centre, Russell Square, London, W.C.1, has kindly stated that it will be pleased to answer any inquiries concerning United Nations Documents that may be made by readers.

⁴ The agreements follow more or less the standard form set by the *Double Taxation Relief Convention with the United States of America with respect to Taxes on*

- and the Prevention of Fiscal Evasion with respect to Taxes on Income. [March 4, 1949, Statutory Instrument No. 358.]
- Arrangement, etc., with Dominica. [March 4, 1949, SI No. 359.]
- Arrangement, etc., with Falkland Islands. [March 4, 1949, SI No. 360.]
- Arrangement, etc., with Grenada. [March 4, 1949, SI No. 361.]
- Arrangement, etc., with Jamaica. [March 4, 1949, SI No. 362.]
- Arrangement, etc., with the Federation of Malaya. [March 4, 1949, SI No. 363.]
- Arrangement, etc., with St. Lucia. [March 4, 1949, SI No. 366.]
- Arrangement, etc., with St. Vincent. [March 4, 1949, SI No. 367.]

Income of April 16, 1945, which was ratified in the United Kingdom on February 19, 1946 (St.R. & O. 1946, No. 1327). Similar agreements were made in 1946, 1947 and 1948 with Canada (St.R. & O. 1946, No. 1885), Southern Rhodesia (St.R. & O. 1946, No. 1886), South Africa (St.R. & O. 1947, No. 315), Australia (St.R. & O. 1947, No. 806), New Zealand (St.R. & O. 1947, No. 1776), various British Overseas Territories (St.R. & O. 1947, Nos. 1773-1775, 1777-1779, 2864-2874, 2878), and with the Netherlands of October 15, 1948 (Cmd. 7555) which latter has not yet been ratified.

The legal basis of these agreements is Part V of the Finance Act, 1945, and Schedule VII to the Act as amended by Finance Act, 1947, and Schedule IX to it. After approval by the House of Commons, they are given the force of law by an Order in Council.

In order to avoid double taxation the conventions employ two principal methods:—(a) elimination, (b) alleviation of double taxation.

- (a) Certain classes of income derived from one country by a resident of the other country are, subject to certain conditions, *exempt* from tax in the country of source. These classes are profits from trade or business not arising through a 'permanent establishment', shipping and air transport profits, patent and copyright royalties, pensions, purchased annuities, and remuneration for personal or professional services of temporary visitors. Remuneration of visiting professors and teachers, during a period of temporary residence not exceeding two years, is exempted in the country visited. Some conventions exempt dividends from any tax additional to the tax on the profits which they represent. Investment income from South Africa is not exempted.

The exemption from tax in the country of source does not apply to:

- (i) students and apprentices who are exempted from tax on payments received from persons in the country of their ordinary residence.
 - (ii) Salaries and wages paid to Government officials or Government pensions, which, with certain restrictions and exceptions, are exempted from tax in the country of residence and chargeable to tax in the country whose Government pays them.
 - (iii) Income from real property and natural resources is taxed in the country of situs. (including in the convention with the Netherlands income from mortgages).
- (b) To alleviate the burden of double taxation, tax in the country of source is reduced in certain cases. Instances are the United States' and Canada's withholding tax, the Australian tax on dividends, the Swedish coupon tax. Where income is not exempted from tax because it does not belong to the exempted classes or because the conditions for exemption are not fulfilled, mutual credit of tax in the country of source against tax in the country of residence is given. Foreign tax credit is, for instance, allowed in the case of a person who has a double residence in both countries and is therefore not exempted from tax in either country.

The conventions provide for the exchange of information between the taxation authorities of the contracting countries.

Arrangement, etc., with Singapore. [March 4, 1949, SI No. 368.]

Agreement between the United Kingdom Government and the Government of the Republic of Ireland for the reciprocal Relief of Double Taxation in respect of United Kingdom Profits Tax and Irish Corporation Profits Tax of May 18, 1949. [July 28, 1949, SI No. 1434.]

Convention between His Majesty in respect of the United Kingdom of Great Britain and Northern Ireland and His Majesty the King of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income of March 30, 1949. [September 29, 1949, SI No. 1841.]

Arrangement, etc., with Basutoland. [November 25, 1949, SI No. 2197.]

Arrangement, etc., with Bechuanaland. [November 25, 1949, SI No. 2198.]

Arrangement, etc., with Swaziland. [November 25, 1949, SI No. 2199.]

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Burma. [March 13, 1950, Cmd. 7935.]

Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. [March 27, 1950, Cmd. 7926.]

The Editor and the members of the Editorial Committee do not hold themselves in any way responsible for the views expressed by contributors.

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